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In the Supreme Court of the United States

OCTOBER TERM, 1974

BERT A. DAVID, *Commander, Fort Dix Military Reservation,*
JAMES R. SCHLESINGER, *Secretary of Defense,*
PETITIONERS

v.

BENJAMIN SPOCK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commanding General of Fort Dix and James R. Schlesinger, the Secretary of Defense, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The initial opinion of the district court (App. A, *infra*, pp. 1a-8a) is reported at 349 F. Supp. 179. The initial opinion of the court of appeals (App. B, *infra*, pp. 9a-32a) is reported at 469 F. 2d 1047. The district court's final opinion (App. F, *infra*, pp. 39a-

43a) is unreported. The final opinion of the court of appeals (App. H, *infra*, pp. 47a-55a) is reported at 502 F. 2d 953.

JURISDICTION

The judgment of the court of appeals (App. I, *infra*, p. 56a) was entered on August 14, 1974. By orders entered November 1, 1974 and December 3, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to January 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the commanding officer of a military base has authority to prohibit political speeches on the base.

2. Whether the commanding officer of a military base has authority to prohibit the distribution on the base of unauthorized publications without his prior approval.

STATUTE AND REGULATIONS INVOLVED

18 U.S.C. 1382 provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

Army Regulation 210-10, ¶ 5-5 provides in part:

* * * * *

> c. *Restrictions on disseminations of publications.* If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.
>
> * * * * *
>
> e. *Distribution outlets.* An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the

publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported as required in *d* above.

Army Regulation 360-61 provides:

2-1. *General.* The policy of the Department of the Army is to support public events in the civilian domain subject to operational and training requirements, budget limitations, and guidelines enumerated in paragraph 2-3.

2-2. *Restrictions.* a. Army participation (and cooperation) is not authorized when such participation may directly or indirectly (indorse or selectively) benefit (or favor), or appear to (indorse or selectively) benefit (or favor) a private individual, group, corporation (whether for profit or nonprofit), sect, fraternal organization, quasi-religious or ideological movement, political group, or commercial venture, or be associated with solicitation of votes in a political election.

(1) For the purposes of this regulation—

(a) Providing use of Government facilities, such as transportation, housing, or messing, at Government expense is considered a form of Army participation.

* * * * *

Fort Dix Regulation 210-26, ¶ 2(a) provides:

Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation.

Fort Dix Regulation 210-27 provides in part:

2. *PROPER PRACTICES*: The distribution or posting of handbills, circulars, pamphlets or other writings or publications issued by commanders and staff agencies relating to the performance of their respective missions is authorized.

3. *PROHIBITED PRACTICES*:

a. The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies other than those set forth in paragraph 2, above, and paragraph 5, below, is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters.

* * * * *

5. *ADMINISTRATIVE INSTRUCTIONS*:

a. Fort Dix Regulation 210-6 controls the issuance of authorizations for the conduct of business by private concerns on the reservation. Individuals not specifically covered within the cited regulation will be referred to the Adjutant General, this headquarters.

b. Fort Dix Regulation 600-18 governs fund-raising activities on the reservation.

c. AR 28-85 and DA Pamphlet 28-30 govern the operation of the Special Services Army Library Service.

d. Persons requesting information about the sale or distribution of commercial magazines or commercial newspapers should be directed to the Post Exchange Officer.

e. AR 360-81 governs the publication of Armed Forces newspapers internally or as civilian enterprise publications.

f. This regulation does not apply to publications of nonappropriated funds, sundry funds and private associations which have been established in accordance with applicable Army regulations.

STATEMENT

This action was brought to enjoin the Army from enforcing its regulations governing political campaigning and the distribution of literature within Fort Dix, New Jersey. The plaintiffs were four candidates of the People's Party and the Socialist Workers Party for the offices of President and Vice President of the United States in the 1972 election, the Socialist Workers Party itself, and four other individuals who had been barred from entering Fort Dix because of their distribution of unauthorized pamphlets on the base.

Fort Dix comprises fifty-five square miles ceded by the State of New Jersey to the Federal Government. The State retains only the right to serve civil process and maintain easements over four county roads that run through the base (App. A, *infra*, pp. 3a-4a). The base is located in a rural area 18 miles from Trenton, New Jersey. Although sentries are not normally posted at the gates, the provost marshal patrols all interior roads on a twenty-four hour basis. "No Trespassing" signs are posted along the one state highway which passes through the post (App. 95a-96a).[1]

In September 1972, the four plaintiff candidates wrote to General David, the Commander of Fort Dix, announcing that they intended "to visit Fort Dix to campaign among the servicemen and servicewomen there" (App. 14a). General David replied that the candidates would not be permitted to campaign on Fort Dix, explaining that (App. 16a):

> There are several compelling reasons for this denial which I shall enumerate. First, there are lawful regulations in effect which prohibit political speeches and similar activities on all of the Fort Dix Military Reservation (Fort Dix Regulation 210-26). The distribution of literature without prior approval of this headquarters is also prohibited (Fort Dix Regulation 210-27). Also, Department of the Army Regulations prohibit military personnel from participating in any partisan political campaign and further prohibit them from appearing at public demonstrations in uniform.
>
> The mission assigned to me as Commanding General of Fort Dix is to administer basic combat training to approximately 15,000 men at any given time. These men spend a period of eight weeks here during which they perform their

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[1] "App." refers to the appendix filed in the court of appeals. "App. E" refers to the exhibit volume filed in the court of appeals.

> training on very vigorous schedules occupying virtually all of their time. I am not in a position to dilute the quality of this training by expanding these schedules to include time to attend political campaigning and speeches. Political campaigning on Fort Dix cannot help but interfere with our training and other military missions.
>
> To decide otherwise could also give the appearance that you or your campaign is supported by me in my official capacity. I feel that I am prohibited from doing this for any candidate for public office.

Nevertheless, candidates Spock and Pulley approached the base on September 23, 1972, where a group of approximately sixty onlookers were waiting (App. 8a, 105a). An officer acting on General David's behalf refused to allow the candidates to enter Fort Dix.

The four other plaintiffs had each been evicted from Fort Dix between 1968 and 1972 after they had been found distributing unauthorized pamphlets on the base which had not been submitted for prior approval to the base commander. The various pamphlets discussed military discharges, protested the Vietnam War, and advertised a planned anti-war demonstration (App. 10a). These plaintiffs were each barred from returning to Fort Dix and advised that reentry would violate 18 U.S.C. 1382.

This action was commenced on September 29, 1972, against General David and the Secretary of Defense. Plaintiffs sought a declaration that the two Fort Dix Regulations pursuant to which General David had

acted (Nos. 210-26 and 210-27) violated the First and Fifth Amendments and an injunction directing the defendants to admit the plaintiffs to Fort Dix and preventing them "from interfering in any way with Plaintiffs' exercise of their First Amendment rights on the Base both before and after the 1972 election" (App. 12a). The plaintiffs also moved for a preliminary injunction.

Following a hearing, the district court denied a preliminary injunction (App. A, *infra*, p. 8a). The court of appeals reversed and directed that a preliminary injunction be entered in favor of the four plaintiff candidates, but not the four other plaintiffs who sought to distribute literature (App. B, *infra*, pp. 30a-31a). This Court, dividing five-to-four, denied a stay of that order (409 U.S. 971; App. C, *infra*, p. 33a).

The district court then entered a preliminary injunction allowing the four candidates to campaign on the unrestricted areas of Fort Dix, but subject to limitations respecting time, place, and number of persons involved, to prevent interference with military functions and military and civilian traffic (App. D, *infra*, pp. 34a-35a). The injunction also barred the military from requiring prior approval of any of the candidates' communications. By a supplementary order, the candidates or their representatives (not to exceed 25 persons at one time) were authorized to distribute campaign literature during designated times at post exchanges, family housing areas, movie theatres, and the main commissary (App. E,

infra, pp. 36a-38a). In addition the Army was ordered to provide the candidates with a specific theatre parking lot to conduct campaign activities on the afternoon of Saturday, November 4, 1972.

As these orders authorized, candidate Spock spoke to a crowd of 100 to 200 at Fort Dix, and his campaign literature was distributed there. Although no violent or disruptive incident occurred during the rally, 30 to 40 military personnel attended the rally in uniform and some of them held campaign placards, in violation of Army Regulation 600-20, ¶ 5-29, which prohibits active participation in partisan political campaigns and permits attendance as a spectator at political meetings and rallies only when not in uniform (see App. E 59). In addition, it was necessary that 54 military personnel perform traffic control and stand-by police duty (App. 262a).

On June 22, 1973, the district court entered a permanent injunction in favor of the four plaintiff candidates and the four other plaintiffs who sought to distribute literature (App. G, *infra*, pp. 44a-46a). The court noted that the plaintiffs all desired to continue their activities at Fort Dix (App. F, *infra*, pp. 40a-41a).[2] Based upon evidence of the costs of alternative methods of communicating with Fort Dix personnel (magazine and radio advertisements and direct mailing), the court found that the $10,000 ju-

[2] Because plaintiff candidates Jenness and Pulley were below the constitutional age limit for the offices they had sought, however, the complaint was dismissed as to them (App. F, *infra*, pp. 40a-41a).

risdictional amount requirement of 28 U.S.C. 1331 (a) had been met by each plaintiff.

The district court enjoined the Army from interfering with political campaigning or the distribution of literature upon the unrestricted areas of Fort Dix, which are open to the civilian public (App. G, *infra*, pp. 44a-45a). The order permits the Army to restrict areas of the base to military personnel and to regulate the time, place, and number of candidates or pamphleteers "as shall be shown by defendants to be necessary to prevent interference with the military mission of the Base and the flow of military and civilian traffic" (App. G, *infra*, p. 45a). The injunction also bars the Army from enforcing its regulations barring all political speeches on base and requiring prior approval of literature distributed on the base. The court of appeals affirmed (App. H, infra, p. 47a).

REASONS FOR GRANTING THE WRIT

This case presents two important and related questions regarding the Army's authority to restrict political activity by civilians on military bases: whether the commanding officer of a military base has authority to prohibit (1) political speeches on the base and (2) the distribution of unauthorized publications there without his prior approval. The regulations of the commanding officer of Fort Dix imposing those restrictions are typical of those in effect at most military bases throughout the country. Army Regulation 306-61, *supra*, p. 4, prohibits Army participation and cooperation (defining "participa-

tion" to include the use of Army facilities) with political groups which directly or indirectly benefits, or appears to benefit, those groups. Army Regulation 210-10, ¶ 5-5(e), *supra*, p. 3, authorizes base commanders to require approval before unauthorized publications may be distributed on base.[3]

By affirming the district court's injunction prohibiting the Army from interfering with either political campaigning or the distribution of unapproved literature in areas of Fort Dix open to the civilian public, the court of appeals encroached upon both the "unquestioned authority which commanding officers of military installations have exercised throughout * * * history," *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 892, and the maintenance of political neutrality vital to the preservation of the Army's independence and integrity. Cf. *Parker* v. *Levy*, No. 73-206, decided June 19, 1974. While this case grew out of political activities in the 1972 election, the court's injunction has continuing effect, and the controversy remains very much alive. The injunction applies to political speeches for any elective office, and the distribution of any literature—including that which is unrelated to particular elections. A decision with such significant effect as to drastically reduce the authority of military commanders to maintain proper order and discipline

[3] While we disagree with the court's holding that plaintiffs here satisfied the $10,000 minimum jurisdictional amount under 28 U.S.C. 1331, we are not here challenging that ruling.

within military installations mandates review by this Court.

1. The court of appeals' holding that the First Amendment prohibits the commanding officer from barring all political speeches at Fort Dix is at odds with decisions of this Court which have recognized "the different character of the military community and of the military mission [which] require[s] a different application of [First Amendment] protections." *Parker* v. *Levy*, *supra*, slip op. at 23. Cf. *Burns* v. *Wilson*, 346 U.S. 137, 140; *Toth* v. *Quarles*, 350 U.S. 11, 17; *Orloff* v. *Willoughby*, 345 U.S. 83, 94. " 'In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. * * * Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command.' " *Parker* v. *Levy*, *supra*, slip op. at 24, quoting *United States* v. *Priest*, 21 U.S.C.M.A. 564, 570; 45 C.M.R. 338, 344.

It is vitally important that the Army be able to maintain both the reality and the appearance of political neutrality, especially in regard to the support of particular candidates for elective office. The court's injunction, however, virtually forces the Army to become directly entangled in electoral politics.

As Dr. Spock's rally demonstrates, the making of political speeches on military bases almost certainly will induce some servicemen to violate valid regulations prohibiting their attendance at political meetings when in uniform and prohibiting their active par-

ticipation in partisan activities under any circumstances. Cf. *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548. It also requires that the Army use its personnel to provide police and traffic control support for the candidates.

Moreover, as General David stated in refusing to permit the candidates to campaign on the base, such campaigning "could also give the appearance that you or your campaign is supported by me in my official capacity" (App. 16a). Finally, as this Court noted in *Lehman* v. *City of Shaker Heights*, No. 73-328 (decided June 25, 1974), with regard to political advertising on a city's rapid transit system, "[t]here could be lurking doubts about favoritism, and sticky administrative problems might arise in parcelling out limited space to eager politicians." Slip op. at 6. In short, the advent of campaign rallies at military bases cannot help but undermine public confidence in the political neutrality of the armed services and involve the Army in delicate judgments about facilities and support personnel to be provided particular political candidates for such purposes.

As the Court noted in *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, 367 U.S. at 890, the commander of a military base necessarily must have complete authority to control access to the base, including authority to exclude from it any or all civilians.[4] The fact that civilians are normally permitted

[4] See also *Holdridge* v. *United States*, 282 F.2d 302 (C.A. 8); *Weissman* v. *United States*, 387 F.2d 271 (C.A. 10); *United States* v. *Jelinski*, 411 F.2d 476 (C.A. 5), certiorari denied, 396 U.S. 943; *Bridges* v. *Davis*, 443 F.2d 970 (C.A. 9), certiorari denied, 405 U.S. 919.

on non-restricted areas of the base does not diminish the commander's authority to exclude them when he deems it appropriate, nor does it give civilians an unfettered right to hold political meetings or make political speeches on the base. The government "has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47-48. The government may legitimately prohibit political rallies from occurring on premises where such meetings would be incompatible with the official uses to which the premises are put. "The rights of free speech and assembly * * * do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana*, 379 U.S. 536, 554.

The court of appeals erred in ruling that *Flower* v. *United States*, 407 U.S. 197, compelled the conclusion that General David could not prohibit political campaigning on the base. In *Flower*, the Court summarily reversed a conviction under 18 U.S.C. 1382 for distributing leaflets within the boundaries of Fort Sam Houston after the distributor had been barred from the post for similar distributions. Unlike the instant case, however, the distribution in *Flower* took place on an "important traffic artery" which passed through the Fort and over which more than 17,000 civilian vehicles traveled during 24 hours of each

day without interference from the military. The sidewalks of the street were used extensively at all hours by civilians, and there was no sentry post or guard at either entrance of the street to the Fort or along the route.

This Court ruled that "[u]nder such circumstances the military has abandoned any claim that it has a special interest in who walks, talks, or distributes leaflets on the avenue." 407 U.S. at 198. By contrast, Fort Dix is located in a rural area, the provost marshal of the base patrols all roads on a 24-hour basis, and "No Trespassing" signs are conspicuously posted (App. 95a-96a). The Army has not, therefore, "abandoned any claim" to control the areas of Fort Dix open to the public.

Moreover, while in *Flower* the distribution of leaflets may have been directed primarily at civilians passing on the public avenue, respondent candidates in the instant case avowedly sought to "visit Fort Dix to campaign among the servicemen and servicewomen there" (App. 14a). Indeed, the court's injunction in the instant case applied to all non-restricted areas of the base, not merely the four county roads that cross the base.[5]

The court of appeals apparently read *Flower* as establishing the broad principle "[i]f the reservation is open to all the rest of the public, there is no basis

[5] In addition, while *Flower* sought merely to distribute handbills, respondent candidates sought to conduct political rallies and make political speeches—activities that necessitate direct Army involvement.

for holding that it may be closed, selectively, to political candidates or to distributors of unapproved literature" (App. B, *infra*, p. 24a).[6] The fact that civilians are admitted to non-restricted areas of the base for certain purposes, however, does not mean that they have an unfettered right to hold political rallies on the base. As this Court noted in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569, "property does not lose its private character merely because the public is generally invited to use it for designated purposes." The non-restricted areas of Fort Dix do not provide an "open-ended invitation to the public to use [the Fort] for any and all purposes." *Id.* at 565. See also, *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 338 (White, J., dissenting), quoted with approval in *Lloyd Corp.* v. *Tanner*, *supra*, 407 U.S. at 565.

In invalidating the regulation banning all political speeches the court of appeals found that the Army had created only a "feigned neutrality," stating that "[w]hat the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough nor sufficiently will-financed to attract media coverage * * *" (App. B, *infra*, p. 29a). But the fact that political information reaches

[6] Several other courts have also read *Flower* as establishing a broad right of public access to military bases. See *Burnett* v. *Tolson*, 474 F.2d 877 (C.A. 4); *CCCO-Western Region* v. *Fellows*, 359 F. Supp. 644 (N.D. Cal.).

military personnel through the printed[7] or broadcast media does not mean that the military cannot validly prohibit the quite different activities associated with personal campaigning on a military base. There was unchallenged testimony that no political candidate had campaigned at Fort Dix prior to Dr. Spock's appearance there (App. 70a).[8] All candidates, of course, are free to present their views in person to military personnel by conducting their political rallies just outside the military gates (see App. 47a-48a).

Finally, the court's order permitting partisan political speeches on the base may well infringe the First Amendment rights of military personnel who, because they are on the base "as a matter of necessity, not of choice," lack any "choice or volition" about whether to witness such campaigning. *Lehman* v. *City of Shaker Heights*, *supra*, slip op. at 4, quoting from *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 468, and *Packer Corporation* v. *Utah*, 285 U.S. 105, 110. Because "within the military community there is simply not the same autonomy as there is in the larger civilian community," *Parker* v. *Levy*, *supra*, slip op. at 16, military personnel comprise what amounts to a "captive audience" for political candidates who come to the base to make political speeches. As this Court stated in *Lehman*, *supra*, however, the First Amendment does not require that "military compounds, and other public facilities * * * become Hyde Parks open to every would-be pamphleteer and politician." Slip op. at 6. Indeed, the concern for the First Amendment rights of captive recipients of political messages which the Court expressed in *Lehman*, dealing with advertising space in rapid transit vehicles, is even more directly implicated when, as here, the political message is thrust upon recipients in the form of political rallies and speeches.

[7] See n. 10, *infra*.

[8] Compare *Jenness* v. *Forbes*, 351 F. Supp. 88 (D. R.I.); *Butler* v. *United States*, 365 F. Supp. 1035 (D. Hawaii).

2. The court of appeals' holding that the First Amendment prohibits a ban on the distribution of publications in non-restricted areas of Fort Dix without prior approval of the commanding officer likewise is at odds with decisions of this Court recognizing that the First Amendment has a different scope when applied to the military than in civilian life, *Parker* v. *Levy*, *supra*, and that the government may limit certain forms of political expression incompatible with the purposes for which particular government facilities are used, *Adderley* v. *Florida*, *supra*. Our arguments advanced in Point 1 above, with regard to partisan political speeches, are equally applicable with regard to the distribution of literature.

Here, moreover, the Army did not impose a total ban on the distribution of pamphlets. The Fort Dix regulation merely required that the base commander give his prior approval to publications before they were distributed on base. Plaintiffs failed to obtain such approval. Indeed, pursuant to Army Regulation

210-10, ¶ 5-5, a base commander must grant approval to any distribution unless he finds that the "publication constitutes a clear danger to military loyalty, discipline, or morale" (App. E 54).[9] Army Regulation 210-10 also provides for prompt review by the Department of the Army of any decision by a post commander to bar distribution (App. E 54-55). The ruling of the court of appeals would therefore vitiate the base commander's authority to prevent such clearly dangerous publications from being distributed to military personnel under his command, unless he were to take the drastic step of closing the entire base to civilians.[10]

This Court has repeatedly recognized the validity of prior restraints on communications in situations

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[9] The Army Directive on Guidance on Dissent emphasizes that a "commander may not prevent distribution of a publication simply because he does not like its contents" or because it "is critical—even unfairly critical—of government policies or officials * * *" (App. E 47). The Directive indicates that only those publications which are obscene or which counsel disloyalty, mutiny, or refusal of duty can be barred (App. E 47).

[10] The "clear danger" test also applies to materials distributed through official outlets, such as the Post Exchange. While no prior approval is required for the distribution of such materials, a post commander may delay distribution of a specific periodical if he finds the specified "clear danger." If the Department of the Army agrees, distribution can be prohibited (see Army Regulation 210-10, *supra*, p. 3). Of course, established publications—unlike most pamphlets distributed by civilians—have past issues which normally provide a clear indication whether their next issue is likely to present a "clear danger" to the military.

where otherwise unchecked communications could be dangerous to institutional security. Thus in *Pell* v. *Procunier*, No. 73-918 (decided June 24, 1974), and *Saxbe* v. *Washington Post*, No. 73-1265 (decided June 24, 1974), the Court acknowledged that the First Amendment rights of civilians were necessarily subordinate to the legitimate needs of state and federal prisons to place limits on public access to individual inmates. By the same token, "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline" in the military, *Parker* v. *Levy*, *supra*, slip op. at 23, requires that a base commander have authority to prevent civilians from distributing publications which pose a "clear danger to military loyalty, discipline, or morale." Cf. *Poulos* v. *New Hampshire*, 345 U.S. 395, 405.

Furthermore, the governmental function at stake in this case is not the police power to control civilian activities on public streets, parks, and walkways, where prior restraints on First Amendment rights must bear a heavy presumption against their constitutional validity. What is at stake is, rather, "the governmental function * * *, as proprietor, to manage the internal operation of an important federal military establishment. * * * In that proprietary military capacity, the Federal Government * * * has traditionally exercised unfettered control." *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, 367 U.S. at 896. The civilian public has no absolute First Amendment rights within such military facilities where the military has not, as in *Flower*, *supra*,

"abandoned its claim" to the premises. Indeed, the government could exclude all civilians from the base.[11]

The requirement that publications be approved prior to their being distributed by civilians on the base is not an impermissible prior restraint upon the First Amendment rights of such civilians. On the contrary, the requirement is an appropriate exercise of military authority designed to assure that any civilian who enters the military facility intending to distribute literature will not pose a "clear danger" to military loyalty, discipline, or morale. *Cafeteria & Restaurant Workers Union, supra*; *Holdridge* v. *United States, supra*; *Weissman* v. *United States, supra*; *United States* v. *Jelinski, supra.*[12]

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[11] See *supra*, p. 14.

[12] The injunction is further improper in that it rescinds the bar order against one pamphleteer whose conduct was not protected by the First Amendment even under the rationale of the court of appeals. Plaintiff Stanton was barred from Fort Dix because he had distributed leaflets in a barracks (App. 10a, 112a), a restricted area not open to the civilian public (App. 87a-88a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1975.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1621-72

(Filed October 12, 1972)

BENJAMIN SPOCK, JULIUS HOBSON, LINDA JENNESS, ANDREW PULLEY, SOCIALIST WORKERS PARTY, JOHN GINAVEN, DONALD MISCH, ALAN HARDY, ROBERT STANTON, PLAINTIFFS

vs.

BERT A. DAVID, Commander, Fort Dix Military Reservation, MELVIN LAIRD, Secretary of Defense, DEFENDANTS

OPINION

FISHER, District Judge

Plaintiffs seek a preliminary injunction ordering defendants from enforcing several Army and Post Regulations which they claim deprives them of their First Amendment rights to make political addresses and to pass out literature in the military confines of Fort Dix.

These allegations are sufficient to establish jurisdiction under 28 U.S.C. Sec. 1331. The application will be decided on stipulated facts, affidavits supplied by the parties and testimony and documents received into evidence at the hearing on October 4, 1972.

The plaintiffs' situations fall into two categories. Generally one group of complainants seek to enter the base as political candidates to hold rallies and make political speeches. They are Benjamin Spock and Julius Hobson, Presidential and Vice-Presidential candidates of the Peoples Party and Linda Jenness and Andrew Pulley, candidates for the same offices on the Socialist Workers Party Ticket.

The second category of plaintiffs is composed of members of anti-Viet Nam conflict groups and draft education and conscientious objector organizations who seek relief from being banned from the military installation at Fort Dix. They are John Ginaven, Donald Misch, Alan Hardy and Robert Stanton, who attempted to and still desire to distribute leaflets at the Fort. Although their intended activities are different, it is interesting to note that they ally themselves in this litigation.

Candidates Spock, Hobson, Jenness and Pulley wrote a letter dated September 9, 1972 to General David, Commanding General at Fort Dix, advising him that on September 23, 1972 they intended to enter the Fort to distribute campaign literature and hold a meeting with service personnel. In the letter they agreed to time and place designated by the defendants. On September 18, 1972 General David responded by letter refusing the request giving the following reasons:

1. Fort Dix Regulation No. 210-26, April 9, 1968, prohibiting demonstrations, picketing, political speeches and the like on the base.

2. Fort Dix Regulation No. 210-27 prohibiting distribution of literature not previously approved as to content.

3. Department of the Army Regulations which prohibit military personnel from participating in any partisan political campaign.

4. Interference with the duties of the military personnel.

5. The Commanding General would appear partisan, if he allowed campaigning.

Undaunted, the candidates then informed General David that they intended to walk on the base to campaign on September 23, 1972 at 11:00 A.M. through the entrance to Fort Dix just outside Wrightstown, N.J. When they arrived, they were refused admittance.

The other plaintiffs who had been distributing literature on the Fort at various times (Stanton as long ago as 1968) were apprehended, evicted and given notice that they were barred from the base.

Fort Dix is a military reservation not far from Trenton, N.J. and located in a rural area. It covers fifty-five square miles and has seven main entrance ways. The roads leading into Fort Dix are not covered by guards or barriers. Apparently, because of the cut-back in personnel and inaccessibility of the military installations, it has not been deemed necessary to establish these precautions.

When the land which the base covers was ceded by the State of New Jersey to the Federal Govern-

ment the only reservations were easements over four roads for transportation and the right to serve civil process on the reservation. The Provost Marshal maintains five to eight patrols around the clock throughout the post and keeps control over all roads and all areas.

The primary military mission at Fort Dix is training. It is an Infantry Center. At present there are two basic combat training and one advanced individual training brigades encamped. These units train from five days to five and one-half days per week. Other specialty training is also conducted. Over 10,000 personnel were engaged in training activities on September 23, 1972. The vast majority of the geographical area of the Reservation is devoted to training activities.

In addition to trainees, approximately 6,080 people are living on the post in family units and 2600 civilians are employed on the base. There are civilian concessions allowed on the grounds as a service to both the military and the civilian employees.

A 1970 traffic check, which has not been brought up to date, discloses a great volume of both civilian and military vehicular traffic in and out of Fort Dix.

Plaintiffs contend that the right to campaign on the military reservation and to pass out leaflets is protected by the First Amendment as defined in the cases of *Flower* v *United States*, 407 U.S. 197 (1972) and *Jenness* v *Frame*, —— F. Supp. —— (D.R.I. 1972).

In *Flower, supra,* the petitioner was distributing leaflets advertising a debate at a local college on New Braunfels Avenue, a street within the limits of Fort Sam Houston, Texas. He had previously been removed from the post and barred therefrom. He was charged with a violation of 18 U.S.C. 1382, convicted in the District Court and sentenced to six months in prison. The Fifth Circuit Court of Appeals affirmed (one judge dissenting) but the Supreme Court reversed. New Braunfels Avenue was an unguarded arterial highway, freely used by vehicles twenty-four hours a day. Traffic on the road was heavy, being used by buses, taxis and other public transportation as well as private automobiles. Further the sidewalks were used extensively by civilians as well as military personnel. There is nothing in the two opinions which would indicate any control of New Braunfels Avenue by the military. In a short *per curiam* opinion the Supreme Court (three justices dissenting) held:

> "*Under such circumstances* the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off of this public street because he was distributing leaflets than could the city police order any leafleteer off any public street. Cf. Lovell v City of Griffin, 303 U.S. 444 (1938), Schneider v State, 308 U.S. 147 (1939). '(S)treets are natural and proper places for the dissemination of information and opinion,' 308 U.S. at 163. '(O)ne who is rightfully on a street

which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.' Jamison v Texas, 318 U.S. 413, 416 (1943).

The First Amendment protects petitioner from the application of Sec. 1382 under conditions like those of this case. Accordingly, without need to set the matter for further argument, we grant the petition for a writ of certiorari and reverse the conviction." (Emphasis supplied) 407 U.S. at p. 198-199.

In *Jenness*, *supra*, the District Court in a case like this one at hand and with some of the same plaintiffs as here involved, held that the Commanding Officer at Quonset Point Naval Air Station could properly refuse to permit political activity in the restricted and fenced areas of the base but then decided that the First Amendment required plaintiffs to be permitted to campaign in the non-restricted family housing area.

It is settled that a commanding officer of a military or a naval installation can summarily exclude civilians from the area of command. *Cafeteria Workers* v *McElroy*, 367 U.S. 886 (1961). Additionally, there is no violation of First Amendment rights in prohibiting demonstrations on public owned property not designated for general public use. *Adderley* v *Florida*, 385 U.S. 39 (1966); *Cox* v *Louisiana*, 379 U.S. 559 (1965). Further, in a case decided just ten days after *Flower*, *supra*, Justice Powell speaking for the Court in *Lloyd Corp.* v *Tanner*, 407 U.S. 551

(1972) held that a shopping mall management could prevent anti-war pamphleteering on its property because the Court has never held that a trespasser or an uninvited guest could exercise general rights on private property, significantly adding, ". . . Even where public property is involved, the Court has recognized that it is not necessarily available for speech, pickets or other communicative activities". 407 U.S. at p. 568.

It is clear that the First Amendment rights of the plaintiff must be carefully weighed against the interests of the military in prohibiting political activity in the confines of the base and other exercises inimical to the military mission at Fort Dix. The reasoning behind the Regulations here involved is apparent. Aside from urging its personnel to vote, clearly a healthy motive, the military must remain politically antiseptic. This has been the policy of the armed forces throughout the history of the Republic. Further, to allow activity on the military reservation which would interfere with the mission of the Command makes no sense whatsoever.

Plaintiffs' confidence in the holding in *Flower*, *supra*, is misplaced. That case, as indicated heretofore, dealt with a street on a military reservation which for all intents and purposes had become like any other municipal thoroughfare. It had, in the view of the Supreme Court, been "abandoned" by the military.

In this case, the Command has not "abandoned" control over any part of Fort Dix. Although civilian

vehicles are allowed across some four of its roads, the Military Police has jurisdiction and authority over all criminal offenses and traffic violations throughout the base and as the testimony of the Provost Marshal disclosed, exercises it.

Therefore, in my view, *Flower, supra,* was never intended to apply to the situation in which we are here involved. *Jenness* v *Frame, supra,* has been offered to persuade me to plaintiffs' position. There is much agreement between this Court and the opinion of the learned District Court in *Jenness,* but insofar as that court has extended the *Flower* decision, I respectfully decline to follow.

The application by plaintiffs for a preliminary injunction is denied.

Defendants have moved for a severance of the candidates' cases from those of the pamphleteers. In view of the foregoing I need not determine the efficacy of that application at this time.

Submit an order.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1934

BENJAMIN SPOCK; JULIUS HOBSON; LINDA JENNESS; ANDREW PULLEY; SOCIALIST WORKERS PARTY; JOHN GINAVEN; DONALD MISCH; ALAN HARDY and ROBERT STANTON, APPELLANTS

v.

BERT A. DAVID, Commander, Fort Dix Military Reservation, MELVIN LAIRD, Secretary of Defense

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(D.C. Civil No. 1621-72)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12(6)
October 17, 1972

Before GIBBONS and ROSEN, *Circuit Judges,*
and LAYTON, *District Judge*

OPINION OF THE COURT

(Filed October 27, 1972)

GIBBONS, *Circuit Judge.*

This is an appeal authorized by 28 U.S.C. § 1292 (a)(1) from an order of the district court refusing a preliminary injunction. It is before this panel as a result of the appellants' motion for an injunction pending appeal pursuant to Rule 8(a) Fed. R. App. P. or in the alternative for expedited consideration of the appeal. We granted the alternative motion for expedited consideration and the case was submitted without oral argument pursuant to Local Rule 12(6).

The appellants, plaintiffs below, are in two categories. Spock and Hobson are, respectively, candidates of the People's Party for President and Vice President of the United States in the election to be held on November 7, 1972, Jenness and Pulley are, respectively, the candidates for President and Vice President of the Socialist Workers Party. That organization, a national political party, is also a plaintiff. The Socialist Workers Party, Spock, Hobson, Jenness and Pulley, will be referred to collectively as the candidates. Ginaven, Misch, Hardy, and Stanton are individual political activists who in the past have distributed leaflets within the Fort Dix Military Reservation, in New Jersey, and who have, as a result of that activity received from the Commanding Officer of that base letters ejecting them from Fort Dix and barring their reentry. These bar orders are

enforced by the sanction of 18 U.S.C. § 1832.[1] Ginaven, Misch, Hardy and Stanton will be referred to collectively as the barred pamphleteers. The appellee David is the Commanding Officer of the Fort Dix Military Reservation, and the appellee Laird is the Secretary of Defense. On September 29, 1972, the candidates and the barred pamphleteers filed a one count complaint seeking injunctive relief in aid of the exercise of claimed first amendment rights both before and after the 1972 election.

The candidates alleged that on September 9, 1972, they had written a joint letter to David advising him of their intent to enter Fort Dix on September 23, 1972, for the purpose of distributing campaign literature and of holding a meeting to discuss election issues with service personnel and their dependents. The letter expressed their willingness to confine their campaigning to such times and places as might be designated by David. On September 18, 1972 David replied by a letter which advised the candidates that their request to visit Fort Dix and campaign was denied. The letter referred to Fort Dix Regulation

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[1] "Whoever, within the jurisdiction of the United States goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined not more than $500 or imprisoned not more than six months, or both."

No. 210-26 [2] which, he said, prohibits political speeches and similar activities on all of the Fort Dix Military Reservation. It also referred to Fort Dix Regulation No. 210-27 [3] which, he said, prohibits the distribution of literature without the prior approval of headquarters. The letter also advised that any person entering Fort Dix for the purposes prohibited by Regulations 210-26 and 210-27 would violate 18 U.S.C. § 1382. On September 23, 1972, candidates Spock and Pulley went to Fort Dix, where an officer acting on David's behalf refused to admit them to the base and prevented their entrance.

The barred pamphleteers each allege that at various times in the past each was peacefully distributing literature on the base, each was taken into custody and ejected from the base, and each received a letter barring him from the military reservation in the future and warning that reentry might constitute a violation of 18 U.S.C. § 1382.

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[2] "2. *PROHIBITED PRACTICES:*

a. Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation."

[3] "3. *PROHIBITED PRACTICES:*

a. The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies other than those set forth in paragraph 2, above, and paragraph 5, below, is prohibited on the Fort Dix Military Reservation without proper written approval of the Adjutant General, this headquarters."

With the complaint was filed a motion for a preliminary injunction, an expedited hearing and an order to show cause. The district court issued an order directing the defendants to show cause on October 6, 1972, why a preliminary injunction should not be issued. On October 4, the United States Attorney filed three affidavits in opposition to the preliminary injunction and a motion pursuant to Fed. R. Civ. P. 20(b) for an order severing the candidate plaintiffs from the barred pamphleteer plaintiffs. No answer has been filed, and the district court has not yet ruled upon the severance motion. An evidentiary hearing was held on the return day of the order to show cause, and on October 12, 1972, the district court filed an opinion denying the application for a preliminary injunction. An order to that effect was signed on Ocotber 13, 1972, and this appeal followed.

JURISDICTION

We are confronted at the outset with the appellees' contention that the appeal should be dismissed for lack of federal jurisdiction. The district court opinion states, without discussion, that the allegations of the complaint are sufficient to establish jurisdiction under 28 U.S.C. § 1331. The jurisdictional statement of the complaint refers to 28 U.S.C. § 1331, § 1343 and § 1361, and to several other federal statutes [4] of a non-jurisdictional character. 28 U.S.C. § 1343 is inapplicable. It deals only with state action. This

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[4] 5 U.S.C. § 701 *et seq.*; 42 U.S.C. § 1972.

case involves actions taken solely on federal authority. 28 U.S.C. § 1361 is one of the grants of federal jurisdiction to which no jurisdictional amount is attached. But by no fair reading could the complaint be construed as alleging an action in mandamus to compel David and Laird to perform a duty owed to the plaintiffs. Under plaintiffs' theory in the complaint defendants are acting outside of their authority. It sets forth a suit in equity for an injunction against interference with civil rights protected by the first amendment. The only basis for federal jurisdiction is the general grant of federal question jurisdiction found in 28 U.S.C. § 1331, and to that grant Congress has attached a jurisdictional amount. *See Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 547 (1972). The complaint does contain the allegation that the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs, but that mere allegation does not end the inquiry. *E.g.*, *Tanzymore* v. *Bethlehem Steel Corp.*, 457 F.2d 1320 (3d Cir. 1972); *Nelson* v. *Keefer*, 451 F.2d 289 (3d Cir. 1971).

It may seem incongruous that if a state officer such as the Commanding Officer of a National Guard base were charged with violations of first amendment rights there would be federal jurisdiction regardless of jurisdictional amount, *see Lasher* v. *Shafer*, 460 F.2d 343 (3d Cir. 1972), but that when a federal officer is so charged the plaintiff must assume the added burden of establishing that the matter in controversy exceeds the sum or value of $10,-

000.00. Some courts and commentators have suggested that Congress cannot constitutionally require that more than $10,000.00 be in controversy if the effect is to bar any federal judicial review of a constitutional claim. *See Cortright* v. *Resor*, 325 F. Supp. 797, 808-81 (E.D.N.Y.), *rev'd* on other grounds, 447 F.2d 245, 250-51 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); *Murray* v. *Vaughn*, 300 F. Supp. 688, 695 (D.R.I. 1969); Note, *The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers*, 71 Colum. L. Rev. 1474 (1971); *cf. West End Neighborhood Corp.* v. *Stans*,[5] 312 F. Supp. 1066, 1068 (D.D.C. 1970). *Compare* the above with *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970). That view, however, is hardly consistent with the history of federal question jurisdiction. The lower federal courts had no general federal question jurisdiction until the Judiciary Act of 1875. Prior to 1875 the enforcement of the Bill of Rights was the responsibility of the state courts, subject only to review of their decisions by the Supreme Court. When the lower federal courts were first granted federal question jurisdiction a jurisdictional amount requirement was attached, and such a requirement has remained ever since. The jurisdiction of the state courts, however,

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[5] While the District Court for the District of Columbia is an Article III Court, 28 U.S.C. §§ 88, 132, it also has the jurisdictional attributes of a state court. *See* 2A Moore, Federal Practice ¶ 8.07 [3], at 1640 (2d ed. 1968).

was in no way affected by the grant to federal courts of concurrent jurisdiction in federal question cases. In this case, for example, David could have been sued in the state courts of New Jersey. He would undoubtedly have removed to the federal courts pursuant to 28 U.S.C. § 1442(a)(1), since the suit is for acts which were done under color of his federal office. In the removed action the jurisdictional amount requirement would have been inapplicable because § 1442 is a separate jurisdictional grant without regard to amount in controversy. *Willingham* v. *Morgan*, 395 U.S. 402 (1969); *Venable* v. *Richards*, 105 U.S. 636 (1882). But if he did not elect to remove, the suit could proceed in the state court. The availability of that remedy would probably suffice to answer any contention that Congress could not constitutionally impose a jurisdictional amount requirement applicable to civil rights cases against federal officers. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1401 (1953). In any event, that constitutional issue, if it is one, does not seem to concern the Supreme Court, for it recently said:

> "Thus, for example, in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction. See *Ostereich* v. *Selective Service Board*, 393 U.S. 233; *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388." *Lynch* v. *Household Finance Corp.*, *supra*. at 547.

The plaintiffs must, then, meet the amount-in-controversy requirement.

The Government contends, relying principally upon *Hague* v. *CIO*, 307 U.S. 496 (1939), that the rights of freedom of speech and assembly are of such a nature as not to be susceptible of valuation in money and are thus beyond the reach of the jurisdiction conferred by § 1331. There is dicta in Justice Stone's opinion suggesting as much. *Id.* at 527-32. But his was not the opinion of the Court, and the Supreme Court has never so held. The sixth circuit, in *Goldsmith* v. *Sutherland*, *supra*, relying on Justice Stone's dictum, has accepted the Government's position. In addition to *Hague* v. *CIO*, *supra*, the sixth circuit relied, for authority for the proposition that claims of infringement of the right of free speech are incapable of monetary valuation on *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965), and *Carroll* v. *Somerville*, 116 F.2d 918 (2d Cir. 1941). *Giancana* was a complaint based upon an allegedly unlawful surveillance by agents of the FBI. The complaint did not allege and the plaintiff did not show that the allegedly unlawful activities of the agents subjected him to damages in excess of $10,000.00. To the extent that *Giancana* decides anything beyond the failure to allege and show the jurisdictional amount in controversy, it must be regarded as overruled by *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), which holds that a claim for damages for valuation of fourth amendment rights is justiciable under § 1331.

Carroll does not hold that first amendment rights are incapable of valuation. It holds only that the record in that case established the amount in controversy as a specific amount of lost wages, $1,138.80, which was less than the then applicable $3000 jurisdictional amount.

Section 1331 refers both to sum and to value. In cases in which there is an adequate remedy at law, the recovery of damages, the jurisdictional amount must be determined by reference to the sum of those damages. In cases where there is no adequate remedy at law, the measure of jurisdiction is the value of the right sought to be protected by injunctive relief. In some situations the line between the two types of cases tends to blur, as in an action for damages for infringement of fourth amendment rights. *See, e.g., Bivens* v. *Six Unknown Named Agents, supra.* But there are many intangible interests the invasion of which will be quite difficult to value in dollars. One of these is the interest of a Selective Service System registrant in being lawfully classified. That interest obviously must be measured by the intangible value of the proper classification. Though the value of that right may be difficult of precise measure, that difficulty does not make the claim nonjusticiable under § 1331. *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 826 (2d Cir. 1967). The federal courts in injunction actions under § 1331 or § 1332 frequently are asked to protect such intangibles as the good will adhering to a trademark. *E.g., Schering Corp.* v. *Sun Ray Drug Co.*, 320 F.2d 72 (3d Cir. 1963); *Ambassador East, Inc.* v. *Orsatti, Inc.*, 257 F.2d 79 (3d 1958). If these intangible interests are sufficiently capable of valuation to meet the jurisdictional amount requirement there is no reason to lay down a rule of law that the rights of free speech and free assembly present nonjusticiable problems of valuation. Thus we cannot say as a legal certainty that the plaintiffs at final hearing will be unable to justify the jurisdictional claims which they have pleaded. We decline to follow *Goldsmith* v. *Sutherland, supra,* insofar as that case suggests the propriety of dismissing for lack of federal jurisdiction.

PRELIMINARY RELIEF AND JURISDICTIONAL AMOUNT

There is, of course, the point that in the hearing on the plaintiffs' motion for a preliminary injunction no proof was offered specifically directed to establishment of the value of the civil rights for which protection is sought. From this the Government urges that the denial of preliminary injunctive relief should be affirmed without going to the merits of the claims. We do not agree. We have rejected the contention that first amendment rights are incapable of valuation and hence nonjusticiable in a § 1331 case. The complaint alleged the requisite jurisdictional amount. When the motion for a preliminary injunction was before the district court on October 6, 1972, the return day of the order to show cause, that allegation had not been traversed either by answer or by affi-

davit. The jurisdictional amount contention was not urged upon the district court. The hearing was directed to the alleged incidents of infringement of first amendment rights and to the justification or lack of justification for those infringements. The district court assumed that jurisdiction of the federal court was not in issue, at least with respect to the preliminary injunction. In these circumstances it was understandable that no effort was made to introduce evidence directed specifically to the value of the claimed rights. This was, after all, not a final hearing, but a hearing on a motion for a preliminary injunction. Since as the record of the district court comes before us the allegation of jurisdictional amount remains untraversed, and we cannot say as a legal certainty that the plaintiffs will never be able to establish their jurisdictional amount claim, we must proceed on the same assumption as did the district court.

Indeed on the evidence in the record it seems at this juncture far more likely than not that the district court will ultimately hold that the value of some of the rights sought to be protected exceeds $10,000.00. Four of the plaintiffs are candidates for the nation's highest political offices. The rights of speech and assembly for which they seek protection are intimately connected with their quest for that office. Just as in an action for unfair competition we would look at the value of the trademark rather than at the extent of the infringement, *Schering Corp.* v. *Sun Ray Drug Co., supra; Ambassador East, Inc.* v. *Orsatti, Inc., supra,* so in a political campaign we should

look at the value of the campaign rather than at the extent of infringement of the constitutionally protected right to pursue it. The claimed jurisdictional amount of the barred pamphleteers may not be quite so clear. Even as to them, however, without suggesting what our final position may be if the case comes before us after final hearing, we cannot say that the view expressed by Judge Weinstein in *Cortright* v. *Resor, supra,* is unreasonable. He wrote:

> "Free speech is almost by definition, worth more than $10,000, so that the allegation of jurisdiction based upon 1331 ought not be subject to denial." 325 F. Supp. at 810.

At this preliminary stage, in the state of the record before us, it seems more likely than not that the appellants will, as the district court assumed, satisfy the jurisdictional amount requirement at final hearing. Thus we reject the jurisdictional amount contention as a basis for denial of preliminary injunctive relief.

THE MERITS OF THE CLAIM

As we have said above, the complaint alleges claims on behalf of two groups with somewhat separate interests, the candidates and the barred pamphleteers. It alleges separate violations which raise two issues. One is applicable to the candidates only. The other is common to both groups. The issue applicable to the candidates only is the legality of barring them from the base because of their status as candidates.

The issue common to both groups is the legality of the prohibition against distributing literature which has not been submitted to the prior restraint of an approval by the Adjutant General of Fort Dix pursuant to Fort Dix Regulation No. 210-27.

Under *Flower* v. *United States*, 407 U.S. 197 (1972), a resolution of these issues requires a description of the Fort Dix Military Reservation. In *Flower* the Court made clear that the power of military authorities to restrict general access to a military facility, recognized in *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961), did not apply to those parts of the facility to which the public has been freely admitted. It reversed Flower's conviction for violation of 18 U.S.C. § 1382. The violation charged was the distribution of leaflets within the boundaries of Fort Sam Houston, San Antonio, Texas, after having been barred from the post for similar distributions. The distribution took place on New Braunfels Avenue which passed through the fort, an open post, and over which 17,740 vehicles a day passed without interference from the military.

The district court held that Fort Dix, unlike Fort Sam Houston, was not an open post. That finding is clearly erroneous. The record establishes that Fort Dix, a reservation of over fifty-five square miles, is crossed by ten paved roads including a major state highway, Route 68, on all of which unrestricted vehicular traffic, civilian as well as military, is permitted at all times. In addition, there are many un-

paved trails. On the paved roads and on the trails unrestricted pedestrian traffic is permitted. Buses, operated as common carriers, use the roads on the base. They pick up and discharge passengers, civilian and military. Civilians are authorized on the post. There are numerous employed civilians. Business concessions are conducted on the post. Civilians are welcome to visit soldiers. Tourists are welcome. Entertainments are occasionally provided at which as many as 5000 people may congregate at a sports arena on the post. Outside chaplains conduct religious services on the post. One can visit the post for any reason at all, or no reason at all, except apparently, to campaign for political office or to distribute unapproved leaflets. The gate at which candidates Spock and Pulley were stopped is on the Wrightstown road, about five feet from the commercial district of Wrightstown. It is normally open and unguarded, but was apparently guarded by representatives of defendant David on September 23, 1972, in anticipation of the visit. A traffic count taken in 1970, the most recent available, disclosed a daily vehicle count through the reservation of 66,000 vehicles. There are a few restricted areas in the reservation, such as the ammunition magazine area and the stockade, but these are either fenced off, or if not fenced off, marked by signs as restricted areas or patrolled by sentries. Only authorized personnel are permitted in the restricted areas, but the remainder of the base is open to the general public, except for political candidates, or persons distributing unap-

proved literature, and except for those persons to whom the commander of the fort has issued a bar order. Fort Dix, when compared to Fort Sam Houston, is *a fortiori* an open post. *See Jenness* v. *Frame*, Civil No. 4855 (D.R.I., August 10, 1972).

The Federal Government exercises jurisdiction over the entire reservation. Its military policemen enforce traffic regulations and the criminal laws applicable to offenses on federal military reservations. But the fact of the exercise of such jurisdiction does not imply the power to selectively exclude persons solely on the ground of exercise of rights protected by the first amendment. If the reservation is open to all the rest of the public, there is no basis for holding that it may be closed, selectively, to political candidates or to distributors of unapproved literature.

We do not suggest any lack of vitality to the principle announced in *Cafeteria Workers* v. *McElroy*, *supra*. That principle undoubtedly protects from intrusion those areas of Fort Dix which have in fact been closed to the public. *See Adderley* v. *Florida*, 385 U.S. 39 (1966). And it is clear that even on an open post the military authorities are as free as their civil counterparts to impose reasonable regulations to prevent disruption of the primary mission of the facility. *See Cox* v. *Louisiana*, 379 U.S. 559 (1965). But here the record makes clear that distribution of leaflets to military personnel and to the base housing, occupied by military personnel and their dependents, is permitted if the leaflets are first approved as to content. The record makes clear that almost the world-at-

large, with the exception of political candidates, is free to come on the base and talk to persons living and working there. The record makes clear that large assemblies occasionally take place. Thus we cannot find that distribution of leaflets, face to face campaigning, or even the holding of meetings would *per se* be disruptive of the mission of the facility. The military authorities have themselves decided otherwise.

The district court refers to the recent decision in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), as authority for the denial of the preliminary injunction. That case is not in point. It involved the right of a private owner of a shopping center to issue invitations to his place of business for selected private rather than for public purposes. The case limits *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, 391 U.S. 308 (1968) and *Marsh* v. *Alabama*, 326 U.S. 501 (1946). That entire line of cases, however, turns upon the extent to which private parties have, by undertaking functions of a nature generally thought of as public, made themselves subject to the strictures of the first amendment which are ordinarily applicable to governmental actions. *Lloyd Corp.* does not enlighten on the issues presented in this case, which involves governmental action to which the first amendment clearly applies. It is one thing to say that a private landowner may issue invitations to the public for selective purposes and thereby exclude demonstrations from his premises. It is quite another to say that a governmental

official charged with the custody and control of publicly owned lands may issue or withhold such invitations using a classification forbidden by the first amendment. The latter is the charge alleged in this case.

Nor do we imply that the military commander of an open post may not be free to issue bar orders prohibiting some persons from the entire post. The record discloses that such orders have been issued for offenses such as possession of marijuana or narcotics, assault, possession of stolen property, solicitation for prostitution, carrying concealed weapons, traffic offenses, contributing to the delinquency of a minor, impersonating a female, fraud, and unauthorized use of an ID card. For all of these activities bar orders may be appropriate. But bar orders have also been issued for distributing "unauthorized publications." Unauthorized publications are those which have not been submitted to and approved by the Adjutant General, and his approval or disapproval depends upon the content of the message. A more vivid instance of a prior restraint on activities protected by the first amendment can hardly be imagined.

The Government contends that Fort Dix Regulations No. 210-26, which prohibits political speeches, and No. 210-27, which requires approval of the content of publications prior to their distribution, are authorized, at least, if not required by Army Regulation No. 360-61. In relevant part that regulation provides:

"2-1 General. The policy of the Department of the Army is to support public events in the civilian domain subject to operational and training requirements, budget limitations, and guidelines enumerated in paragraph 2-3.

2-2. Restrictions. a. Army participation (and cooperation) is not authorized when such participation may directly or indirectly (indorse or selectively) benefit (or favor), or appear to (indose or selectively) benefit (or favor) a private individual, group, corporation (whether for profit or nonprofit), sect, fraternal organization, quasi-religious or ideological movement, political group, or commercial venture, or be associated with solicitation of votes in a political election.

(1) For the purpose of this regulation—

(a) Providing use of government facilities, such as transportation, housing, or messing, at government expense is considered a form of Army participation."

This Army Regulation seems on its face inapplicable. The appellants did not seek the use of Government transportation, housing, or messing. They sought the same right of public access as is afforded to the public-at-large. Moreover, even if permitting political campaigning and leaflet distribution in the open areas of Fort Dix were to be considered to be the provision of Government facilities, it stretches credulity to assume that permitting such use would be an endorsement or selective benefit for the candidates who in this case seek relief. All that is required by Army

Regulation No. 360-61, it would seem, is even-handed neutrality.

The district court would require much more than even-handed neutrality. Its opinion urges:

> "It is clear that the First Amendment rights of the plaintiffs must be carefully weighed against the interests of the military in prohibiting political activity in the confines of the base and other exercises inimical to the military mission at Fort Dix. The reasoning behind the Regulations [Fort Dix Nos. 210-26, 210-27] here involved is apparent. Aside from urging personnel to vote, clearly a healthy motive, the military must remain politically antisepetic."

With the voting age at eighteen years probably the vast majority of the 28,000 people living in Fort Dix are entitled to vote. If they are to exercise that franchise intelligently they should have as free access to campaign information, subject to the time strictures of their military occupations, as citizens generally. A policy of antisepsis such as the district court envisioned would not be neutral. It would consign military voters to the category of the uninformed. But in fact there is no such policy of antisepsis. The record discloses that the military permits the circulation and distribution in Fort Dix of a wide range of newspapers and magazines, and that radios and televisions are available during off-duty hours. Thus the persons living in Fort Dix are exposed to the political ideas of those candidates whose campaigns are prominent enough or well-financed enough

to attract widespread media coverage. In these circumstances the antisepsis of Fort Dix Regulations Nos. 210-26 and 210-27 is hardly a neutral antisepsis. What the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough nor sufficiently well-financed to attract media coverage, and who must make do with the more old fashioned face-to-face style of campaigning. Such a feigned neutrality serves no discernable military purpose, and cannot outweigh the first amendment rights of the minor candidates.

PRELIMINARY RELIEF

The need for immediate equitable relief for the candidates is apparent. On October 6, 1972, the election was less than a month away. Today only thirteen days remain. The district court held that there was § 1331 jurisdiction. As to the candidates, the record establishes their status as such and there is an overwhelming likelihood that at final hearing their candidacy will be valued in excess of $10,000. They brought this action promptly after being excluded on September 23, 1972. Their cases present a strong likelihood of success at final hearing. A preliminary injunction should have been granted. The barred pamphleteers are in a somewhat different position. Their interests are neither so directly connected with the November 7, 1972 election, nor so promptly and diligently pursued in the courts, as are the interests of the candidates. They make a lesser showing of

immediate irreparable injury and possibly a lesser showing of likelihood of meeting the jurisdictional amount. In their case it was, we think, within the bounds of permissible discretion for the district court to withhold relief until final hearing.

Judge Rosen concurs in the result (1) because the district court judge has determined § 1331 jurisdiction and no objection was made to this conclusion by the appellee in the district court, and (2) because this case is squarely within the parameters of the Supreme Court holding in *Flower* v. *United States*, *supra*.

The order of the district court will be reversed and the case remanded for the entry of a preliminary injunction directing the defendants to cease from interfering with the political campaigning by the candidate plaintiffs Spock, Hobson, Jenness and Pulley or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation between the date hereof and November 7, 1972. The order may provide that the right of the candidates to campaign and the distribution of campaign literature shall be subject to such restrictions as to time, place and numbers of persons involved, as shall have been shown by the defendants to be necessary to prevent interference with the military functions of the base, and the flow of military and civilian traffic, but shall not provide for the prior approval of any authority of the contents of any communication.

The case should be set down for a final hearing promptly to dispose of the claims of the candidate plaintiffs for injunctive relief after November 7, 1972, and of the claims for injunctive relief of the barred pamphleteer plaintiffs. The mandate of this court will issue forthwith.

LAYTON, *Senior Judge.*

With deference, I must dissent for two reasons.

First, in my view, the orderly administration of justice demands that the question whether the required jurisdictional amount is here present should be remanded to the District Court which made no substantive determination of this issue for the reason that it was unchallenged by the government in the lower court, Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967).* Once a finding is made, the substantive question can then be decided on further appeal.

But even should the District Court, based upon some such rationale as advanced by Judge Weinstein

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*** At P. 826: "Because Judge McLean was of the opinion that this suit was not presently justiciable, he had no occasion to determine whether or not appellants could demonstrate the presence of the requisite amount in controversy. It is an unfortunate gap in the statutory jurisdiction of the federal courts that our ability to hear a suit of this nature depends on whether appellants can satisfactorily show injury in the amount of $10,000 but the fact remains and *on remand the District Court must determine this question.*" (Emphasis added.)**

in Cortright v. Resor, 325 F.Supp. 797, 810 (E.D. N.Y. 1971),* conclude that the requisite jurisdictional amount were present, I would have grave difficulty in agreeing for the reason that such a result is not in reality a finding of fact ** but, rather, an expression of judicial philosophy having the effect of judicially legislating a plain gap in the statutory jurisdiction of the federal courts. See *Wolff* at p. 826. Thus viewed, the chance of success on final hearing would be remote rather than extremely likely.

Although one's personal belief may be that the right of free speech is inherently far more valuable than the question of jurisdictional amount, nevertheless, one cannot use that belief to expand the jurisdiction of the federal courts beyond that expressly authorized by Congress. Lynch v. Household Finance Corp., 405 U.S. 538, 547 (1972).

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* "Free speech is almost by definition worth more than $10,000.00."

** Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir. 1970).

APPENDIX C

UNITED STATES SUPREME COURT

Friday, November 3, 1972

No. A-467

MELVIN LAIRD, SECRETARY OF DEFENSE ET AL.

v.

BENJAMIN SPOCK ET AL.

ORDER IN PENDING CASE

The application for a stay of the judgment of the United States Court of Appeals for the Third Circuit (No. 72-1934) is denied. The Chief Justice, Mr. Justice White, Mr. Justice Blackmun and Mr. Justice Rehnquist would grant the stay.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1621-72

(Filed October 31, 1972)

BENJAMIN SPOCK, ET AL.

v.

BERT DAVID AND MELVIN LAIRD

ORDER

AND NOW, this 31st day of Oct., 1972, pursuant to the mandate of the United State Court of Appeals for the Third Circuit in the above matter, IT IS HEREBY ORDERED:

1. Defendants are directed to cease from interfering with the political campaigning by the candidate plaintiffs Spock, Hobson, Jenness and Pulley or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation between the date hereof and November 7, 1972.

2. The right of the candidates to campaign and the distribution of campaign literature shall be subject only to such restrictions as to time, place and numbers of persons involved as shall be shown by defendants to be necessary to prevent interference with the military functions of the base and the flow of military and civilian traffic.

3. Defendants shall make no requirement of prior approval of the contents of any communication.

/s/ Clarkson S. Fisher
Clarkson S. Fisher
U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action 1621-72

(Filed November 1, 1972)

BENJAMIN SPOCK, ET AL, PLAINTIFFS

v.

BERT A. DAVID, ETC., ET AL, DEFENDANTS

ORDER

AND NOW, this 1st day of November, 1972, in furtherance of the Court's general order of October 31, 1972,

IT IS HEREBY ORDERED that the parties will abide by the following minimal terms concerning a campaign address by the candidate plaintiffs at the Fort Dix military reservation:

1. Candidates Spock, Hobson, Jenness and Pulley, and their designated representatives (hereinafter referred to as leafleteers) shall be authorized to distribute campaign literature and information concerning the date, time and place of the campaign by the said Spock, Hobson, Jenness and Pulley, as hereafter indicated, at the following areas, and during the times indicated:

(a) From noon until closing at the main PX and from 4:00 PM until closing at all branch

PX's, except that at the branch PX's the leaflets may be distributed only within an area of 50 feet on the sidewalk immediately to the front of the main entrance to the said branch PX.

(b) In all family housing areas during the hours from 12 Noon to 8:00 PM;

(c) At the movie theatres from 6:30 PM until the start of the second performance, if any;

(d) At the main commissary from noon until closing;

(e) The leafleteers shall not distribute or attempt to distribute leaflets or campaign material to any soldiers while engaged in any training, or to soldiers in formation, nor shall they interfere with any traffic or other activities of any personnel; nor will they enter any buildings or place leaflets or campaign material on cars or in any building;

(f) There will be no more than 25 leafleteers on Fort Dix at any one time.

2. Fort Dix will make available to the said Spock, Hobson, Jenness and Pulley the parking lot adjacent to Theatre #5 (Building 5164) for them to campaign on Saturday, November 4, 1972 from 1:30 PM to 4:00 PM; said campaign will be conducted within this area without interference with the plaintiffs or soldiers who may desire to attend this rally. Military police, however, may perform normal traffic control functions and take necessary security measures.

3. The plaintiffs and their aides for the campaign on Saturday, November 4, 1972 will not exceed 25.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1621-72

(Filed June 13, 1973)

BENJAMIN SPOCK, JULIUS HOBSON, LINDA JENNESS, ANDREW PULLEY, SOCIALIST WORKERS PARTY, JOHN GINAVEN, DONALD MISCH, ALAN HARDY, ROBERT STANTON, PLAINTIFFS

vs

BERT DAVID, Commander, Fort Dix Military Reservation, MELVIN LAIRD, Secretary of Defense, DEFENDANTS

MEMORANDUM

Plaintiffs applied for a permanent injunction prohibiting the defendants from interfering with their attempts to make political speeches and to distribute anti-war leaflets on the military reservation at Fort Dix, N.J. They seek to establish jurisdiction in this Court by virtue of 28 U.S.C. Section 1331.

Initially, plaintiffs sought a preliminary injunction in this Court and after a hearing the application was denied. *Spock* v. *David*, 349 F. Supp. 179 (D.N.J. 1972). Plaintiffs promptly appealed to the Third Circuit Court of Appeals which reversed and remanded. *Spock* v. *David*, 469 F2d 1047 (3d Cir. 1972).

At the hearing before this Court on the preliminary

injunction I assumed jurisdiction and the lack of it was not urged here by the government. It was, however, raised on appeal and the Circuit Court held that the office-seekers should have prevailed and the defendants enjoined preliminary. The pamphleteers were refused the same relief as their claims were not connected with the election.

Having disposed of the claim of violations of plaintiffs' First Amendment rights in the factual setting here contrary to that of this Court, the Court of Appeals remanded this matter for final hearing on the application for a permanent injunction.

At the outset of the hearing on the remand to this Court, the parties stipulated that the proofs taken at the hea ing for preliminary injunction be incorporated as part of this record. The facts found by me in *Spock* v. *David*, 349 F. Supp. 179 at 180-181 are part of my findings herein.

The proposed activities of the plaintiffs are somewhat different. At the time of the preliminary application, plaintiffs Spock and Hobson were Presidential and Vice-Presidential candidates of the Peoples Party, and Linda Jenness and Andrew Pulley were seeking the same offices under the auspices of the Socialist Workers Party. Plaintiffs Ginaven, Misch, Hardy and Stanton are people interested in handing out anti-war literature and conscientious objector information to members of the armed forces based at Fort Dix. Plaintiffs' answers to defendants' interrogatories disclosed that plaintiffs Jenness and Pulley were below the constitutional age limit for the

office they were seeking. Therefore, as to them, the complaint is dismissed.

Plaintiffs Spock and Hobson were hardly a factor in the Presidential race of 1972 and were defeated. They, however, desire to continue political activity on the military reservation and the leafleteers still wish to distribute their literature at the same place. In view of the clear direction of the Third Circuit Court of Appeals in this matter, the issue is whether or not this Court has jurisdiction to grant the relief sought under 28 U.S.C. Section 1331.

Like the Third Circuit Court of Appeals, I cannot say that the views expressed by Judge Weinstein in *Cortright* v. *Resor*, 325 F. Supp. 797, 808-811 (E.D. N.Y. 1971), *rev'd on other grounds*, 447 F.2d 245, 250-251, (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972), that almost by definition free speech is worth more than $10,000, are unreasonable. However, at the final hearing plaintiffs introduced testimony which clearly indicates that the amount in controversy exceeds the $10,000 jurisdictional requirement of 28 U.S.C. 1331. In order to get their message to the soldiers at Fort Dix by means other than those which they attempted the cost would be prohibitive to the plaintiffs. A full page of Time Magazine would have cost $12,125.00 in black and white and $18,790 in color. Local radio advertising which could be received at Fort Dix would cost in excess of $1100 per week. Direct mailing of literature to members of the military at Fort Dix would cost between $3500 and $4000 per 1000 soldiers and it has been

established that army personnel on the base is in the neighborhood of 10,000. In addition to trainees and cadre there are over 6000 people living on the base in family units in addition to 2600 civilians employed there. Jurisdiction then is clearly established.

Therefore, under the mandate of the Third Circuit Court of Appeals, defendants should be and are permanently enjoined from interfering with the political campaigning of plaintiffs Spock and Hobson and the distribution of campaign literature on their behalf within the unrestricted areas of the military reservation at Fort Dix and from interfering with the distribution of literature by plaintiffs Ginaven, Misch, Hardy and Stanton within areas where the public has open access to Fort Dix. This injunction shall not apply, however, to the areas designated as restricted by the military command at Fort Dix and subject to the restrictions by the same command as to time, place and numbers of persons involved, as shall be shown by the defendants to be necessary to prevent interference with the military mission of the base and the flow of military and civilian traffic.

Defendants are further restrained from making any requirement of prior submission for approval of the contents of any communication and are further enjoined from the enforcement of Fort Dix Regulation 210-27 which requires prior submission and approval of materials distributed on the base and Fort Dix Regulation 210-26 which prohibits political speeches on the base.

Defendants are further enjoined from issuing bar

notices based on the protected activity described in this opinion or evicting plaintiffs for this activity. The order of this Court shall not be construed to prevent defendants from issuing bar notices and evicting persons from Fort Dix for other unlawful activities.

The complaint of plaintiffs Jenness and Pulley is dismissed. There will be no costs assessed. Submit an Order in conformity with this opinion and the opinion of Judge Gibbons in *Spock* v. *David*, 469 F. 2d 1047 (3d Cir. 1972).

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action 1621-72

(Filed June 22, 1973)

BENJAMIN SPOCK, ET AL., PLAINTIFFS

v.

BERT DAVID, ETC., ET AL., DEFENDANTS

FINAL ORDER

AND NOW, this 22nd day of June, 1973, pursuant to the mandate of the United States Court of Appeals for the Third Circuit, and after final hearing, the Court hereby makes the following Order:

1. This Court has valid federal question jurisdiction of this case pursuant to 28 USC 1331 based on the following findings: * * * (2) the rights asserted here have a value in excess of $10,000; (3) plaintiffs have offered concrete evidence showing that the rights asserted here have a value in excess of $10,000.

2. Defendants are permanently directed to cease and are permanently enjoined from: (1) interfering with political campaigning by the plaintiffs Spock, Hobson, and Socialist Workers Party, or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation; and (2) interfering with dis-

tribution of literature by the plaintiffs, Ginaven, Misch, Hardy and Stanton, within the unrestricted areas of the Fort Dix Military Reservation. This injunction shall not apply, however, to the areas designated as restricted by the military command at Fort Dix.

3. The right of the candidate plaintiffs to campaign and the right of the candidate and pamphleteer plaintiffs to distribute literature shall be subject to such restrictions as to time, place and numbers of persons involved as shall be shown by defendants to be necessary to prevent interference with the military mission of the Base and the flow of military and civilian traffic.

4. Defendants shall make no requirement of prior submission or approval of the contents of any communication distributed by plaintiffs.

5. Defendants are further enjoined from enforcing Fort Dix Regulation 210-27 insofar as it requires prior submission and approval of materials to be distributed on the Base. In addition, defendants are enjoined from enforcing Fort Dix Regulation 210-26 insofar as it prohibits political speeches on Fort Dix by the prevailing plaintiffs.

6. Defendants are enjoined from issuing bar notices and letters to plaintiffs based on the constitutionally protected activity described in this order. The order of this Court shall not be construed to prevent defendants from issuing bar notices and evicting persons from Fort Dix for other unlawful activity.

7. The complaint of plaintiffs Jenness and Pulley is dismissed.

No costs.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1995

BENJAMIN SPOCK, JULIUS HOBSON, SOCIALIST WORKERS PARTY, JOHN GINAVEN, DONALD MISCH, ALAN HARDY and ROBERT STANTON, APPELLEES

v.

BERT A. DAVID, Commander, Fort Dix Military Reservation, JAMES R. SCHLESINGER, Secretary of Defense, APPELLANTS

(D.C. Civil Action No. 1621-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 14, 1974
Before STALEY, GIBBONS and WEIS, *Circuit Judges*

OPINION OF THE COURT

(Filed August 14, 1974, as amended
September 23, 1974)

GIBBONS, *Circuit Judge*

This case is before us on an appeal from a final order of the district court which granted injunctive relief protecting plaintiffs' first amendment rights from interference by the military authorities at the Fort Dix Military Reservation. The case was before us in October, 1972 on an appeal from the denial of a preliminary injunction, which we reversed. *Spock* v. *David*, 469 F.2d 1047 (3d Cir. 1972). At that time two categories of plaintiffs were before us. Spock and Hobson were candidates of the Peoples Party for President and Vice President of the United States in the election to be held on November 7, 1972. Jenness and Pulley were candidates for the same offices of the Socialist Workers Party. They had been denied permission to conduct a political meeting or to distribute political literature on the Reservation. We referred to those plaintiffs and the Socialist Workers Party as the candidates. Ginaven, Misch, Hardy and Stanton were individual political activists who in the past had distributed leaflets within the Fort Dix Military Reservation, and who had, as a result of that activity, received from the commanding officer of that base letters ejecting them from Fort Dix and barring their reentry. We referred to Ginaven, Misch, Hardy and Stanton collectively as the barred pamphleteers. In reversing the

district court we remanded for the entry of a preliminary injunction directing the defendants to cease from interfering with the political campaigning by the candidate-plaintiffs between the date of our opinion and November 7, 1972. We directed that the case be set down for a final hearing promptly to dispose of the candidate-plaintiffs' claim for injunctive relief after November 7, 1972, and of the claims for injunctive relief of the barred pamphleteer-plaintiffs.

On remand the district court proceeded in compliance with our mandate. It granted the candidate-plaintiffs preliminary injunctive relief pending the November, 1972 election, and set the matter down for final hearing. On December 4, 1972 the defendants filed an answer which affirmatively pleaded that the district court lacks subject matter jurisdiction. At the outset of the final hearing the parties stipulated that the proofs taken in connection with the hearing on the preliminary injunction would be incorporated as a part of the record at final hearing. It appeared that candidate-plaintiffs, Jenness and Pulley, were not of age to be eligible under the Constitution to serve as President and Vice President and their complaint was dismissed. They do not appeal.[1] The only additional testimony offered and received at the final hearing dealt with the jurisdictional amount requirement. 28 U.S.C. § 1331.

The district court, with the identical factual record before it on the merits of the first amendment

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[1] The Socialist Workers Party remains a plaintiff.

claim as was before us in *Spock* v. *David*, *supra*, properly treated that decision as law of the case on the first amendment issue. The defendants on this appeal are in the apparent dilemma of seeking to have us overrule *Spock* v. *David* on the merits while at the same time pressing the contention that there is no federal jurisdiction. This panel is also bound by the law of the case on essentially the same record. This being so we will not repeat the discussion of the merits of the claim. *See Spock* v. *David*, 469 F.2d at 1053-56.

At the time of final hearing the candidate-plaintiffs, Spock and Hobson, though defeated in the presidential race of 1972, desired to continue political activity on the Fort Dix Military Reservation, and the barred pamphleteers desired to distribute their literature on that base. Thus the dispute over jurisdictional amount was not moot. When the case was before us on the appeal from the denial of a preliminary injunction we indicated that the only basis for federal jurisdiction was 28 U.S.C. § 1331, and that the jurisdictional amount requirement of that section must be met. We pointed out:

> "Section 1331 refers both to sum and to value. In cases in which there is an adequate remedy at law, the recovery of damages, the jurisdictional amount must be determined by reference to the sum of those damages. In cases where there is no adequate remedy at law, the measure of jurisdiction is the value of the right sought to be protected by injunctive relief." 469 F.2d at 1052.

We did not find it necessary, in passing upon the claim for preliminary injunctive relief, to detail the methods by which the right to convey a political message might be valued for purposes of § 1331. Jurisdictional amount had not then been traversed by an affidavit or answer in the district court, and we could not say as a legal certainty that the plaintiffs would never be able to establish their jurisdictional claim. Looking at the value of the right to campaign for the offices of President and Vice President, we concluded that it was more likely than not that the district court would hold that this right had a value in excess of $10,000, and we ordered a preliminary injunction. We were less certain about the ability of the pamphleteer-plaintiffs to succeed at final hearing, and declined to order a preliminary injunction.

At final hearing the plaintiffs, while continuing to urge, as they had before this court, that free speech is by definition worth more than $10,000 and that such an allegation ought not be subject to denial,[2] and while continuing to rely on 28 U.S.C. § 1361, introduced testimony which the district court found "clearly indicates that the amount in controversy exceeds the $10,000 jurisdictional requirement of 28 U.S.C. 1331." Appendix at 288a (Memorandum of District Court).

That testimony established the cost of getting the plaintiffs' political message to the 28,000 people liv-

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[2] *See Cortright* v. *Resor*, 325 F. Supp. 797, 810 (E.D. N.Y.), *rev'd on other grounds*, 447 F.2d 245, 250-51 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

ing in Fort Dix by those alternative means which would remain available to them were the challenged bar orders to remain in effect. The testimony was that the alternative means comprised paid advertisements on television and radio stations which broadcast to that viewing area, paid advertisements in print media which the military authorities permitted to circulate on the reservation and direct mail. A full page advertisement in an edition of *Time* magazine which accepted regional advertising for New Jersey would have cost $12,125.00 in black and white and $18,790.00 in color. Local radio advertising which could be received at Fort Dix would cost $1,116.00 a week. A direct mailing would cost between $3,-500.00 and $4,000.00 per 1000 soldiers. The testimony suggested that none of the alternatives would be likely to be as effective as the rallies and the pamphlets prohibited by the military defendants.

The defendants do not challenge the testimony that the cost of alternative means of communication of the political messages sought to be transmitted would far exceed $10,000. They contend that all this undisputed evidence, on which the district court relied in finding the requisite jurisdictional amount, is irrelevant. Their attack is frontal and total. They urge that first amendment rights are incapable of valuation, and that absent a new congressional enactment, there is no federal forum whatsoever for the protection of those rights against deprivations by federal officials. In a footnote they suggest citing Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 Yale L.J. 1385 (1964), that state courts

similarly lack power to enjoin federal officers. Their position, in short, is that no court may entertain a civil suit against a federal officer to enjoin his interference with the exercise of rights protected by the first amendment. If the defendants' frontal and total attack were to succeed they would, of course, have no interest in anything we might have said in *Spock* v. *David*, *supra*, on the merits of the first amendment claim, since they would be free to do as they pleased regardless. But we are past that point. In *Spock* v. *David*, 469 F.2d at 1051, we expressly declined to follow *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970). The rights here in issue are intangible, but they are no more incapable of valuation in money than is pain and suffering, or reputation, or the intangible value of a proper selective service classification, or the intangible value of the right to be tried by a civilian rather than a military tribunal. *See Sedivy* v. *Richardson*, 485 F.2d 1115 (3d Cir. 1973). We have approved valuation of the good will of a trademark, for jurisdictional amount purposes, by looking at the amount spent in advertising the mark. *Schering Corporation* v. *Sun Ray Drug Co.*, 320 F.2d 72, 76 (3d Cir. 1963). The testimony that means of communication alternative to those of which the plaintiffs would be deprived by the continuance of the challenged bar orders would cost in excess of $10,000 was sufficient, for purposes of § 1331, to quantify the value of the rights here sought to be protected. The finding of the district court that such alternative means would cost in excess of $10,000 is amply supported by the record.

The defendants urge that the plaintiffs did not offer proof of the cost of relatively inexpensive alternative techniques of communication such as opening a storefront in Wrightstown, New Jersey, adjacent to one of the entrances to the reservation, and that the district court did not discuss such alternatives. But the defendants offered no evidence as to the availability or cost of the suggested alternatives, or as to their communicative effectiveness compared to the barred activities. They cannot on appeal suggest that the district court's finding, based on the evidence which was presented, was clearly erroneous. There is federal question jurisdiction under § 1331.

Since on the record made in the district court jurisdictional amount was the only matter not governed by the law of the case announced in *Spock* v. *David*, *supra*, we affirm. While we have not repeated in this opinion the discussion of the merits of the first amendment claim set forth in our earlier opinion, we deem it appropriate to note that nothing said there and nothing set forth in the district court's injunction [3] should be construed as limiting the au-

[3] The injunction provides:

"2. Defendants are permanently directed to cease and are permanently enjoined from: (1) interfering with political campaigning by the plaintiffs Spock, Hobson, and Socialist Workers Party, or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation; and (2) interfering with distribution of literature by the plaintiffs, Ginaven, Misch, Hardy and Stanton, within the unrestricted areas of the Fort Dix Military Reservation. This injunction shall not apply, however, to the areas designated as restricted by the military command at Fort Dix.

3. The right of the candidate plaintiffs to campaign and the right of the candidate and pamphleteer plaintiffs to distribute literature shall be subject to such restrictions as to time, place and numbers of persons involved as shall be shown by defendants to be necessary to prevent interference with the military mission of the Base and the flow of military and civilian traffic.

4. Defendants shall make no requirement of prior submission or approval of the contents of any communication distributed by plaintiffs.

5. Defendants are further enjoined from enforcing Fort Dix Regulation 210-27 insofar as it requires prior submission and approval of materials to be distributed on the Base. In addition, defendants are enjoined from enforcing Fort Dix Regulation 210-26 insofar as it prohibits political speeches on Fort Dix by the prevailing plaintiffs.

6. Defendants are enjoined from issuing bar notices and letters to plaintiffs based on the constitutionally protected activity described in this order. The order of this Court shall not be construed to prevent defendants from issuing bar notices and evicting persons from Fort Dix for other unlawful activity."

Appendix at 291a-92a (Final Order of the District Court).

thority of the military officials at Fort Dix to restrict access by non-military personnel generally to any part of the reservation, or to issue bar notices to and evict persons from even the open areas of the reservations for unlawful activities.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
For the Third Circuit.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1995

BENJAMIN SPOCK; JULIUS HOBSON; SOCIALIST WORKERS PARTY; JOHN GINAVEN; DONALD MISCH; ALAN HARDY; ROBERT STANTON

vs.

BERT A. DAVID, Commander, Fort Dix Military Reservation, JAMES R. SCHLESINGER, Secretary of Defense, APPELLANTS

(D.C. Civil Action No. 1621-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: STALEY, GIBBONS and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 22, 1973, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Thomas F. Quinn
Clerk

August 14, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 566213 67

Supreme Court, U. S.
FILED
JUN 19 1975
MICHAEL RODAK, JR., CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-848

THOMAS U. GREER, Commander,
Fort Dix Military Reservation,
JAMES R. SCHLESINGER, Secretary of Defense,
Petitioners,

—v.—

BENJAMIN SPOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 16, 1975
CERTIORARI GRANTED APRIL 14, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-848

THOMAS U. GREER, Commander,
Fort Dix Military Reservation,
JAMES R. SCHLESINGER, Secretary of Defense,
Petitioners,

—v.—

BENJAMIN SPOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
Civil Action 1621-72

DOCKET ENTRIES

Date	Filings—Proceedings
9-29-72	Complaint filed.
9-29-72	Motion for Preliminary Injunction, Expedited Hearing, and Order to Show Cause (with appendices) filed. To be returned 10/6/72.
9-29-72	Summons issued.
9-29-72	Notice of Allocation and Assignment filed.—Trenton —Fisher
10-5-72	Notice of motion of Defendants for severance of plaintiffs, returnable 10-6-72 (Newark), filed 10-4-72.
10-5-72	Affidavit of Harry W. French filed 10-4-72.
10-5-72	Affidavit of Vincent J. Olsen filed 10-4-72.
10-5-72	Affidavit of D. G. Beattle filed 10-4-72.
10-5-72	Affidavit of D. G. Beattle filed 10-4-72.
10-5-72	Affidavit of Mailing of Motion for severance of plaintiffs and affidavits filed 10-4-72.
10-10-72	Transcript of Hearing on order to show cause re preliminary injunction held on 10-6-72 filed.
10-11-72	Hearing on plaintiffs' application for preliminary injunction. DECISION RESERVED. Hearing on defendants' motion for severance of plaintiffs. DECISION RESERVED. (Fisher) (10-6-72) (Newark)
10-13-72	Opinion denying application for preliminary injunction. (Fisher) filed 10-12-72
10-13-72	Order denying application for preliminary injunction filed. (Fisher) Notice mailed.

10-13-72 Copy of opinion mailed to Atty. General of the U.S.

10-16-72 Notice of appeal filed 10-13-72. (Copies mailed to Clerk, U.S.C.A. and U.S. Attorney)

10-17-72 Record on Appeal mailed to Judge Gibbons as per instruction of U.S.C.A. (Notice furnished to counsel)

10-27-72 Summons returned served on 10-11-72 on Bert David; on Melvin Laird, U.S. Attorney, & Attorney General of U.S. on 10-3-72 filed.

11-1-72 Opinion of U.S.C.A. filed.

11-1-72 Certified copy of Judgment of U.S.C.A. in lieu of mandate reversing order of this court filed 10-12-72 & remanding for entry of preliminary injunction filed.

11-1-72 Order for preliminary injunction filed 10-31-72. (Fisher) (Notice Mailed)

11-2-72 Order re minimal terms concerning a campaign address by the candidate plaintiffs at the Fort Dix military reservation filed 11-1-72. (Fisher) (Notice Mailed)

12-4-72 Answer and affidavit of mailing filed.

12-8-72 Interrogatories of defendants to plaintiffs filed.

1-3-73 Plaintiffs' response to interrogatories of the defendant filed.

1-11-73 Notice of motion of defendants, to dismiss the complaint, returnable 1-29-73, and affidavit of mailing filed 1-10-73.

1-30-73 Trial moved before Hon. Clarkson S. Fisher without Jury at 10:00 a.m. Hearing on defendants' motion to dismiss the complaint. DECISION RESERVED. (Fisher) (1-29-73)

2-23-73 Transcript of proceedings held 1-29-73 filed.

3-13-73 Letter amending transcript filed 3-12-73.

6-13-73 Memorandum filed. (Fisher)

6-25-73 Final judgment for permanent Injunction and dismissing complaint as to plaintiffs, Jenness and Pulley without costs filed 6-22-73, (Fisher) (Notice Mailed)

8-22-73 Notice of appeal filed 8-21-73. (Copies Mailed to Clerk, U.S.C.A. and Carl Poplar, Esq.)

9-12-73 Motion of defendants for extension of time for transmission of the record to 10-23-73 filed.

9-17-73 Order extending time to transmit record to 10-23-73, and time for docketing appeal to 10-29-73 filed. (Fisher) (Notice Mailed)

10-24-73 Order extending time to transmit record to 11-14-73 and time for docketing appeal to 11-19-73 filed 10-23-73. (Fisher) (Notice Mailed)

11-14-73 Record on Appeal mailed to Clerk, USCA (Notice furnished to counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1621-72

(Filed September 29, 1972)

Jury Trial Waived

BENJAMIN SPOCK; JULIUS HOBSON; LINDA JENNESS; ANDREW PULLEY; SOCIALIST WORKERS PARTY; JOHN GINAVEN; DONALD MISCH; ALAN HARDY; ROBERT STANTON, PLAINTIFFS

v.

BERT A. DAVID, Commander, Fort Dix Military Reservation, MELVIN LAIRD, Secretary of Defense, DEFENDANTS

COMPLAINT

Plaintiffs, by their undersigned counsel, respectfully allege the following:

Jurisdiction

1. This case arises under the Constitution of the United States, in particular the First and Fifth Amendments, and under 5 U.S.C. §§ 701 *et seq.*; 28 U.S.C. §§ 1331, 1343, and 1361; and 42 U.S.C. § 1972. Jurisdiction is conferred by 5 U.S.C. §§ 701 *et seq.*; 28 U.S.C. §§ 1331, 1343, and 1361; and the First and Fifth Amendments to the Constitution of the United States.

2. The matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

Parties

3. Plaintiff BENJAMIN SPOCK is a resident of New York and the Presidential candidate of The People's Party in the 1972 election.

4. Plaintiff JULIUS HOBSON is a resident of Washington, D.C. and the Vice-Presidential candidate of The People's Party in the 1972 election.

5. Plaintiff LINDA JENNESS is a resident of New York and the Presidential candidate of the Socialist Workers Party in the 1972 election.

6. Plaintiff ANDREW PULLEY is a resident of New York and the Vice-Presidential candidate of the Socialist Workers Party in the 1972 election.

7. Plaintiff SOCIALIST WORKERS PARTY is a national political party which has nominated and run candidates in presidential elections for over twenty years. The Party primarily directs its presidential campaign at specific segments of American society whose political rights and interests, in the Party's view, have been ignored or misrepresented by the major parties and their candidates.

8. Plaintiffs JOHN GINAVEN and DONALD MISCH are residents of Philadelphia, Pennsylvania and staff members of CCCO—An Agency for Military and Draft Counseling. CCCO is a non-profit organization, established in 1948 as the Central Committee for Conscientious Objectors, which publishes and distributes material on military and draft law, trains military and draft counselors, and seeks to spread knowledge of the rights of servicemen and -women.

9. Plaintiff ALAN HARDY is a resident of Philadelphia, Pennsylvania and a staff member of Philadelphia Resistance, a group that actively opposes American involvement in the war concerning the war and their rights.

10. Plaintiff ROBERT STANTON is a resident of Philadelphia, Pennsylvania and was at the time relevant to this Complaint a staff member of the Student Mobilization Committee, a group opposed to American involvement in the war in Indochina.

11. The named Defendants are sued for actions they have taken and threaten to take under color of their official, federal authority and in violation of the Constitution and laws of the United States:

(a) Defendant BERT A. DAVID is Commanding Officer of Fort Dix Military Reservation, New Jersey (hereinafter "the Base").

(b) Defendant MELVIN LAIRD is Secretary of Defense of the United States and resides officially in Washington, D.C.

Cause of Action

12. The Base covers 31,993 acres in Burlington County, New Jersey. It is an open base; there are no gates or hindrances to access. The many entrances and exits include public highways that are major public thoroughfares and are frequently used by civilians traveling through and within New Jersey as well as military personnel and civilians employed on the Base. Many military personnel and civilian employees reside with their dependents on the Base.

13. On September 9, 1972, Plaintiffs SPOCK, HOBSON, JENNESS, and PULLEY wrote a joint letter to Defendant DAVID notifying him of their intent to enter the Base at about 10:30 A.M. on September 23, 1972 for the purpose of distributing campaign literature and holding a meeting to discuss election issues with service personnel and their dependents (a copy of this letter is attached hereto as Exhibit A and incorporated herein). In their letter, Plaintiffs stressed their willingness to confine their campaign to such times and places as might be designated by Defendants. They also pointed out that the Supreme Court of the United States and the United States District Court for the District of Rhode Island had recently upheld the rights of civilians to exercise their First Amendment rights on military bases and that they were particularly interested in campaigning at Fort Dix because it had been recently ruled that service personnel stationed in New Jersey can vote there.

14. By letter dated September 18, 1972 (copy attached hereto as Exhibit B and incorporated herein), Defendant DAVID responded that Plaintiffs SPOCK, HOBSON, JENNESS, and PULLEY "will not be permitted to campaign at Fort Dix." He gave five reasons for prohibiting the exercise of First Amendment rights by Presidential and Vice-Presidential candidates: (a) Fort Dix Regulation No. 210-26, promulgated on April 9, 1968, prohibits all "demonstrations, picketing, sit-ins,

protest marches, political speeches and similar activities" on the Base (a copy of this regulation is attached hereto as Exhibit C); (b) Fort Dix Regulation No. 210-27 prohibits distribution of literature that has not been approved as to content; (c) Department of the Army regulations prohibit military personnel from participating in any partisan political campaign; (d) military personnel do not have time and campaigning would interfere with their duties; and (e) if he were to allow them to campaign, it would appear that he was supporting their candidacies in his official capacity.

15. On September 21, 1972, Plaintiffs SPOCK and PULLEY, through their counsel, informed Defendants that they intended to walk onto the Base for the purpose of campaigning at 11:00 A.M. on September 23, 1972 through the usually open entrance on Fort Dix St. just outside of Wrightstown, New Jersey. They indicated that they wished to speak to Defendant DAVID concerning his decision to prohibit their entrance.

16. On September 23, 1972, Plaintiffs SPOCK and PULLEY approached the Base entrance on Fort Dix Street at about 11:00 A.M. They were met by Col. James Simon, who indicated he was there on behalf of defendant DAVID. Plaintiffs SPOCK and PULLEY repeated their intent to peacefully campaign on the Base at a time and place designated by Defendants. Concerning Defendant DAVID's letter of September 18, 1972, they stated that: recent federal court decisions clearly indicated that Fort Dix Regulations Nos. 210-27 and 210-26 violate the First and Fifth Amendments to the Constitution of the United States and that civilians have a constitutional right to exercise their First Amendment rights on an open military base; military personnel are certainly not participating in a partisan campaign by listening to a campaign speech or reading campaign literature, which they are allowed to do on the Base by means of the mass media, if not in person, concerning the candidates of the major parties; military personnel do have time to listen without interfering with their duties; since it was Saturday, almost half of them had no assigned duties; the Depart-

ment of Defense has issued regulations urging military personnel to vote intelligently; Base officials could in no way be seen as supporting their candidacy by merely allowing them to campaign; and Base officials were allowing military personnel to be exposed to campaigning by the candidates of the major parties by means of television, radio, and newspaper reports. Colonel Simon refused to admit them to the Base and prohibited their entrance.

17. Defendants' policy and its implementation virtually destroys the ability of Plaintiffs SPOCK, HOBSON, JENNESS, and PULLEY to carry their ideas and election campaigns to service personnel and their dependents.

18. Because they are minority candidates with limited financial resources that prevent their access to the mass media, and because their political philosophy is that they must establish their honesty and credibility in face-to-face meetings with voters, it is essential to their campaigns and their ability to compete with the major parties that plaintiffs have access to the Base and other bases having suitable public facilities and large working and residential populations of service personnel and dependents.

19. On or about August 17, 1972, Plaintiffs JOHN GINAVEN and DONALD MISCH were peacefully distributing a booklet concerning the rights of soldiers within the boundaries of the Base (on the sidewalk of the public highway running from Wrightstown to Pemberton, New Jersey). They were taken into custody by agents and employees of the Defendants, released, and issued a notice prohibiting them from entering the Base (copy attached hereto as Exhibit D and incorporated herein).

20. In mid-February, 1972, Plaintiff ALAN HARDY was on the Base peacefully distributing leaflets that announced an upcoming demonstration at McGuire Air Force Base to protest the government's unprecedented use of airpower and anti-personnel bombs against the peoples of Indochina. He was taken into custody for several hours by agents and employees of Defendants, released, and issued a notice prohibiting him from entering the Base (copy attached hereto as Exhibit E and incorporated herein).

21. On or about December 5, 1968, Plaintiff ROBERT STANTON was distributing anti-war leaflets to soldiers at a barracks on the Base. He was taken into custody for a few hours by agents and employees of Defendants, released, and issued a notice prohibiting him from entering the Base (copy attached hereto as Exhibit F and incorporated herein).

22. The implementation of Defendants' policy and regulations to deny Plaintiffs access to the Base violates the First and Fifth Amendments in that:

(a) It deprives Plaintiffs SPOCK, HOBSON, JENNESS, PULLEY and SOCIALIST WORKERS PARTY, as minority political parties and candidates, of their only feasible means of communicating their views and of carrying their campaigns to the service personnel and dependents on the Base. It also deprives the other Plaintiffs of their only feasible means of communicating their views on the election to service personnel and dependents on the Base.

(b) It prevents Plaintiffs from disseminating their ideas among Base personnel while dissemination of other ideas is allowed, thereby discriminating against Plaintiffs' speech, leaflets, and demonstrations because of their content.

(c) It constitutes an unconstitutional violation of Plaintiffs' rights of freedom of speech, association, and assembly.

(d) It constitutes arbitrary censorship of ideas proffered to Base personnel, thereby abridging their right to receive information, and their right to knowingly and effectively exercise their franchise.

23. Defendants' policy and Fort Dix Regulations Nos. 210-26 and 210-27, on their faces, violate the First Amendment in that they constitute a vague and overbroad proscription on speech, assembly, and association.

24. Defendants' blanket prohibition on Plaintiffs' access to the Base has caused and will continue to cause grave and irreparable injury to Plaintiffs' right to free-

dom of speech, association and assembly and to an equal and effective opportunity to communicate their views on the critical election issues to the voters.

25. Unless this Court grants the relief requested herein, Plaintiffs will continue to suffer the grave and irreparable injury described above.

26. Plaintiffs have made no prior application in this or any other court for the relief now requested.

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) Declare Defendants' policy and Fort Dix Regulations Nos. 210-26 and 210-27, and their application by Defendants, void and in violation of the First and Fifth Amendments to the Constitution of the United States;

(b) Direct Defendants, their agents and employees to admit Plaintiffs to the Base for the purpose of exercising their First Amendment rights both before and after the 1972 election;

(c) Enjoin Defendants and their agents and employees from interfering in any way with Plaintiffs' exercise of their First Amendment rights on the Base both before and after the 1972 election; and

(d) Grant such other and further relief as may be appropriate.

/s/ David Kairys
DAVID KAIRYS

/s/ David Rudovsky
DAVID RUDOVSKY
Philadelphia counsel for the
NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE
1427 Walnut Street
Philadelphia, Pa. 19102

Of Counsel:

KAIRYS & RUDOVSKY
1427 Walnut St.
Philadelphia, Pa. 19102

Local Counsel:

/s/ Carl Poplar
CARL POPLAR, ESQ.
702 Wilson Building
130 North Broadway
Camden, New Jersey 08102

Attorneys for Plaintiffs

Dated: September 29, 1972

EXHIBIT A

LETTER DATED SEPTEMBER 9, 1972 TO GENERAL BERT DAVID FROM SPOCK, HOBSON, JENNESS & PULLEY

September 9, 1972

General Bert David
Commanding Officer
Fort Dix, New Jersey

Dear General David:

As presidential and vice-presidential candidates, we intend to visit Fort Dix to campaign among the servicemen and servicewomen there. Both the Peoples Party and the Socialist Workers Party are addressing themselves to the special issues facing U.S. soldiers. For this reason we are bringing our respective campaigns wherever possible directly to the American G.I.

The recent decision allowing G.I.'s stationed in New Jersey to register and vote there will undoubtedly result in an increased number of registered voters at the base, and an increased interest in the presidential contest. For that reason we are especially looking forward to campaigning at Fort Dix.

As you know, the courts have recently upheld the rights of citizens to exercise their first amendment rights on military bases, in *Flower* v. *United States* (June 12, 1972) and *Jenness* v. *Frame* (August 10, 1972).

It is not our intention to disrupt the normal functioning of the base and we will of course abide by any reasonable restrictions as to the time and places of our campaigning. Perhaps you would like to furnish us with a meeting hall or other such facility while we are on the post, where we might address interested soldiers. We will want to distribute our literature and talk to the soldiers about the issues that concern them.

Our visit will take place on September 23, from about 10:30 A.M. to 2:00 P.M. If you have any questions concerning our plans, please contact us through our campaign offices.

The Socialist Workers Party Campaign Committee is located at 706 Broadway, 8th floor, New York, NY 10003, (212) 982-7676. The Peoples Party has its offices at 1404 M Street NW, Washington, DC 20005, (202) 785-1535.

Sincerely,

/s/ Benjamin Spock
BENJAMIN SPOCK
Peoples Party presidential candidate

/s/ Julius Hobson
JULIUS HOBSON
Peoples Party vice-presidential candidate

/s/ Linda Jenness
LINDA JENNESS
Socialist Workers Party presidential candidate

/s/ Andrew Pulley
ANDREW PULLEY
Socialist Workers Party vice-presidential candidate

EXHIBIT B

LETTER DATED SEPTEMBER 18, 1972 TO LINDA JENNESS FROM BERT A. DAVID

[SEAL]

AHBDCG

DEPARTMENT OF THE ARMY

Headquarters US Army Training Center, Infantry,
and Fort Dix
Fort Dix, New Jersey 08640

Sep 18, 1972

Linda Jenness
c/o Socialist Workers Party
706 Broadway, 8th Floor
New York, New York 10003

Dear Ms. Jenness:

This responds to your letter of September 9, 1972, received at 4:36 P.M., September 13, 1972.

Your request to visit Fort Dix and campaign among our servicemen and women is denied.

There are several compelling reasons for this denial which I shall enumerate. First, there are lawful regulations in effect which prohibit political speeches and similar activities on all of the Fort Dix Military Reservation (Fort Dix Regulation 210-26). The distribution of literature without prior approval of this headquarters is also prohibited (Fort Dix Regulation 210-27). Also, Department of the Army Regulations prohibit military personnel from participating in any partisan political campaign and further prohibits them from appearing at public demonstrations in uniform.

The mission assigned to me as Commanding General of Fort Dix is to administer basic combat training to approximately 15,000 men at any given time. These men

spend a period of eight weeks here during which they perform their training on very vigorous schedules occupying virtually all of their time. I am not in a position to dilute the quality of this training by expanding these schedules to include time to attend political campaigning and speeches. Political campaigning on Fort Dix cannot help but interfere with our training and other military missions.

To decide otherwise could also give the appearance that you or your campaign is supported by me in my official capacity. I feel that I am prohibited from doing this for any candidate for public office.

For the foregoing reasons, you will not be permitted to campaign at Fort Dix.

You are further advised that any person entering Fort Dix for purposes prohibited by the regulations mentioned above violates Title 13, U.S.C., Section 1382, which provides, in part, that ". . . whoever . . . goes upon any military reservation . . . for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500.00 or imprisoned not more than six months, or both."

Sincerely,

/s/ Bert A. David
BERT A. DAVID
Major General, USA
Commanding

CF: Andrew Pulley

EXHIBIT C

DEPARTMENT OF THE ARMY

Headquarters US Army Training Center, Infantry
Fort Dix, New Jersey 08640

REGULATION NUMBER 210-26 — 9 April 1968

INSTALLATIONS

DEMONSTRATIONS

1. *PURPOSE*:

This regulation establishes policy concerning demonstrations, pickets, protest marches and similar activities on the Fort Dix Military Reservation.

2. *PROHIBITED PRACTICES*:

a. Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation.

b. No one shall enter on this installation for any of the purposes prohibited by this regulation and such entry will constitute a violation of Title 18, United States Code, Section 1382, which provides in part that . . . "whoever, within the jurisdiction of the United States, goes upon any military . . . reservation, post, fort, arsenal, yard, station or installation, for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500.00 or imprisoned not more than six months, or both."

3. *RESPONSIBILITIES*:

Any individual having knowledge of a violation of this regulation will contact the Provost Marshal as expeditiously as possible.

FOR THE COMMANDER (AHBOGA)

OFFICIAL:

DAVID A. GILE
Colonel, GS
Chief of Staff

/s/ R. St. Pierre
R. ST. PIERRE
LTC, AGC
Asst AG

This regulation supersedes Regulation 210-26(0), this headquarters, 20 September 1967, subject: Demonstrations.

EXHIBIT D

[SEAL]

AHBOCG

DEPARTMENT OF THE ARMY

Headquarters US Army Training Center, Infantry,
and Fort Dix
Fort Dix, New Jersey 08640

17 Aug 72

SUBJECT: Formal Order of Ejection

GINAVEN, John H.
SSAN: 279-38-0327
West Chester, Pa.

1. The officer of the US Army who has delivered this letter to you has been designated by me to order you ejected from the Fort Dix Military Reservation and barred from reentry because of conduct detrimental to the performance of the military mission at this installation.

2. Subsequent entry upon the Fort Dix Military Reservation may constitute a violation of Title 18, United States Code § 1382, and subject you to a fine of not more than $500.00 or imprisonment not to exceed six months, or both.

/s/ Bert A. David
BERT A. DAVID
Major General, USA
Commanding

/s/ Jeremiah P. Morrison
1LT JEREMIAH P. MORRISON
MPC, PMD, FDNJ

DISTRIBUTION:

Individual concerned
Provost Marshal
G2
Chief, Security Police, McGuire AFB
Civilian Personnel Office
Det D, 12 MP Gp (CI)
Local FBI

CHARGES: ILLEGAL SOLICITATION

FDPM FL 3, Dec 69

EXHIBIT E

DEPARTMENT OF THE ARMY

Headquarters US Army Training Center, Infantry,
and Fort Dix
Fort Dix, New Jersey 08640

[SEAL]

AHBOCG

SUBJECT: Formal Order of Ejection

Alan E. Hardy
SSAN #120-32-9855
#3605 Hamilton St., 3rd Floor
Philadelphia, Pa. 19104

1. The officer of the US Army who has delivered this letter to you has been designated by me to order you ejected from the Fort Dix Military Reservation and barred from reentry because of conduct detrimental to the performance of the military mission at this installation.

2. Subsequent entry upon the Fort Dix Military Reservation may constitute a violation of Title 18, United States Code § 1382, and subject you to a fine of not more than $500.00 or imprisonment not to exceed six months, or both.

/s/ Howard H. Cooksey
HOWARD H. COOKSEY
Major General, USA
Commanding

/s/ Stephen S. Kaminsky
Stephen S. Kaminsky
CPT MPC
Provost Marshal Duty Officer
Provost Marshal Division, FDNJ.

DISTRIBUTION:

Individual concerned
Provost Marshal
G2
Chief, Security Police, McGuire AFB
Civilian Personnel Office
Det D, 12th MP Gp (CI)
Local FBI

CHARGES: ILLEGAL DISTRIBUTION

FDPM FL 3, Dec 69

EXHIBIT F

DEPARTMENT OF THE ARMY

Headquarters US Army Training Center, Infantry,
and Fort Dix
Fort Dix, New Jersey 08640

[SEAL]

AHBOCG

5 Dec 68

SUBJECT: Formal Order of Ejection

NAME: Robert Edward Stanton

ADDRESS: 2211 N 52nd St
Philadelphia, Pa

TO: Robert Edward Stanton

1. The officer of the US Army who has delivered this letter to you has been designated by me to order you ejected from the Fort Dix Military Reservation and barred from re-entry because of conduct detrimental to the performance of the military mission at this installation.

2. Subsequent entry upon the Fort Dix Military Reservation may constitute a violation of Title 18, United States Code § 1382, and subject you to a fine of not more than $500.00 or imprisonment not to exceed six months, or both.

/s/ K. W. Collins
K. W. COLLINS
Major General, USA
Commanding

DISTRIBUTION:

Individual concerned
Provost Marshal
G2
Chief, Security Police, MAFB
Civilian Personnel
Det D, 12th MP Gp (CI)
Local FBI

This letter delivered 5 Dec 68 by Bartlett S Fleming 1LT, MPC

BARTLETT S FLEMING 1LT, MPC

FDPM: FL 3, Mar 68

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Filed October 4, 1972]
[Title Omitted in Printing]

AFFIDAVIT OF VINCENT I. OLSEN
COLONEL, UNITED STATES ARMY

Now comes the affiant, VINCENT I. OLSEN, Colonel, United States Army, and says:

I am a Colonel in the United States Army with a permanent duty station at Fort Dix, New Jersey.

Since 4 August 1971, I have been the Provost Marshal at Fort Dix and in that capacity have responsibility for the overall security of the post under the command of Major General Bert A. David at Fort Dix. The main purpose and function of the military police is the enforcement of discipline, law and order throughout the installation. Other duties include direct supervision over the Fort Dix Correctional Facility and coordination with civilian law agencies as to respective areas of responsibility.

Fort Dix covers an area of 55 square miles and has 7 main entrance ways. Post Headquarters office buildings, troop billets, housing areas and the main activity of the post is contained in a much smaller area.

At the present time the roads leading into Fort Dix are not closed in the sense that there are no guards or guard houses on any of the entrance ways. The main reason that this has not been deemed necessary up until the present time is the relative remoteness of Fort Dix from any large population centers. The areas surrounding Fort Dix are mainly rural farmlands and some small towns. We are 18 miles southeast of Trenton, New Jersey, and some 30 miles northeast of Philadelphia. Because of the general inaccessibility of Fort Dix and the expense of manning guards at the entrances of a large military installation, it has not, up until this time, appeared to be worthwhile to establish gate guards.

Fort Dix is a military reservation with exclusive federal jurisdiction. When the land was originally ceded to the Federal Government by the State of New Jersey, the only thing retained by the State of New Jersey was a right of way easement in certain county roads for the purpose of transportation. The only other jurisdiction retained by New Jersey was the right to serve civil process on the reservation. These roads are the Pemberton-Wrightstown Road, Access Highway #68, Saylors Pond Road, North Pemberton-Pointville Road, and the Browns Mill Road. These are reflected on the attached map of the post. These roads are used primarily by military and civilian personnel working on the military installation. The only sidewalks adjacent to these roads are mainly used by personnel who work at Fort Dix.

On a normal day at any given hour, there are five to eight patrols of two men each operating throughout the post. It is standard operating procedure for these military policemen on patrol to stop any suspicious personnel on post and inquire into the reason for his presence. If he is doing something improper or illegal, he will be escorted to the nearest gate. He will be issued a letter of ejection if he is in violation of an Army or post regulation or a federal statute. If it is a mere traffic or other minor offense, the violator will be cited by the military police to the Federal Magistrate court. If it is a serious crime, it will be referred to the United States Attorney's Office in Trenton. This is deemed essential for the maintenance of military security in keeping with the training function of the post.

On 17 August 1972, John Ginaven and Donald Misch were distributing a booklet on the parking lot adjacent to the Wrightstown-Pemberton Road. Fort Dix Regulation 210-27 prevents the distribution of literature on the post without prior approval of the Adjutant General. The above personnel had no such permission. They were escorted from the post and issued a letter of ejection advising them of the violation of Title 18, USC Section 1382, which provides in part that anyone entering a military reservation for any purpose prohibited by law or

lawful regulation shall be fined not more than $500.00 or imprisoned not more than six months, or both.

On 24 February 1972, Alan Hardy was seen placing anti-war demonstration posters on the windshields of cars in the parking lot of Timmerman Theater. This is in violation of FDR 210-27. This theater is geographically located in the middle of the post where most activities take place. Mr. Hardy was escorted off the post and issued a letter of ejection.

Our records at Fort Dix do not go back through 1968. However, the unauthorized entry into a barracks for the purpose of distribution is specifically prohibited by regulations. Para 3h, Fort Dix Regulation 210-6 precludes posters or other forms of advertising for distribution to any part of the installation. Subparagraph n of the same regulation states that "under no circumstances will interviews be conducted in company orderly rooms, barracks, dayrooms, mess halls, service clubs, and other training or troop assembly areas."

VINCENT I. OLSEN, Colonel, United States Army, being duly sworn according to law, deposes and says that the facts alleged in this affidavit are true to the best of his knowledge.

/s/ Vincent I. Olsen
VINCENT I. OLSEN

Sworn and Subscribed before me, a Notary Public, on this 3rd day of October 1972, at Fort Dix, New Jersey.

/s/ Stanley E. Kowaleski
STANLEY E. KOWALESKI
Notary Public of New Jersey
My Commission Expires Aug. 16, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Filed October 4, 1972]
[Title Omitted in Printing]

AFFIDAVIT OF HARRY W. FRENCH,
COLONEL, UNITED STATES ARMY

Now comes the affiant, HARRY W. FRENCH, Colonel, United States Army, and says:

I am a Colonel in the United States Army with permanent duty station at Fort Dix, New Jersey.

Since 26 July 1972, I have been assigned as the Directorate of Plans and Training for the United States Army Training Center, Infantry and Fort Dix, Fort Dix, New Jersey. My duties include overall responsibility for training and planning activities under the command of Major General Bert A. David at Fort Dix.

The primary mission of Fort Dix is to train a current, average, population of 12,000 recruits in an eight and a half week course of Basic Combat Training. This includes vigorous physical training programs designed to gain maximum physical conditioning well before the lapse of this eight week period.

There are currently two basic combat training and one Advanced Individual Training (CS) brigades at Fort Dix.

The training schedules call for a 5½ day training work week for certain battalions and a 5 day work week for other battalions. Personnel receive intensive physical and lecture training in subjects such as Marches and Bivouac, Bayonet Training, Geneva Conventions, Drill and Ceremony, Guard Duty, Map Reading, First Aid, Land Navigation Chemical, Biological and Radiological Warfare, Pugil Training, Land Mine Warfare, Weapons Firing, and individual tactical training. In addition to the actual training periods, substantial periods of time must also be devoted to physical examinations, immunization, inspections, orientations, testing and

ceremonies. Basic Combat Training is a highly condensed activity of physical training in which many trainees use all of their free time for rest and recuperation.

In addition to the basic training function outlined above, there are also several schools here devoted to advanced individual training. Examples of these are the Cooks School, Wiremens Course, Wheeled Vehicle Mechanics Course, Clerks Training, Chaplains Asssitants School, On the Job Military Police Training and Special Training Company.

On September 23, 1972, there were approximately 5,600 active duty personnel actively engaged in various aspects of basic combat training. In addition to these personnel, 4,743 reserve forces personnel were present at Fort Dix and Actively Engaged in training activities, for a total of 10,343 personnel. Approximately 1,000 permanent party personnel would have to be in an on duty status to support the training of these men.

Also located at Fort Dix in an active status are the United States Army Personnel Center, responsible for the world wide movement of military personnel; Walton Army Hospital; Personnel Control Facility. These activities are operated on a 24 hour day and seven day week.

All trainees assigned to Fort Dix are restricted to the post for four weeks. Basic training is a highly intensified period of activity for these men, the degree of which they had probably not previously experienced and will probably never experience again—in or out of the Army.

The vast majority of the geographical area of the Fort Dix Military Reservation is devoted to these training activities. A great deal of this area is off limits to all but authorized personnel in order to minimize interferences with the progress of training.

The training schedules and activities outlined by me are of the highest quality and are designed to produce military personnel of the highest quality. Further dilution of these schedules would serve only to reduce the effectiveness of the training, resulting in a soldier of lesser quality. There is no room for interference with this training. Training periods missed must be made up

by the trainee. Graduates of the Fort Dix training establishment usually go on to another duty station for advanced training and eventually to a permanent duty assignment. Their daily scheduling usually does not resemble an ordinary work week until they arrive at their first permanent duty station.

HARRY W. FRENCH, Colonel, United States Army, being duly sworn according to law, deposes and says that the facts alleged in this affidavit are true to the best of his knowledge, information, and belief.

/s/ Harry W. French
HARRY W. FRENCH

Sworn and Subscribed before me this 2d day of October, 1972.

/s/ Louis J. Greco
LOUIS J. GRECO
CPT, Judge Advocate General's Corps
Authorized to Administer Oaths
Pursuant to 10 USC 936

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Filed October 4, 1972]
[Title Omitted in Printing]

AFFIDAVIT OF D. G. BEATTLE
MAJOR, UNITED STATES ARMY

Now comes the affiant, D. G. BEATTLE, Major, United States Army, and says:

I am the official custodian of the documents attached hereto which is a true and correct copy of a portion of the military police blotter, dated 24 February 1972, at the Provost Marshal's Office, Fort Dix, New Jersey, which we have on official file.

/s/ D. G. Beattle
D. G. BEATTLE

Sworn and Subscribed before
me this 3rd day of October 1972.

/s/ Worth T. Haithcock
WORTH T. HAITHCOCK
CPT, JAGC
Authorized to Administer Oaths
Pursuant to 10 USC 936

Affidavit of D.C. Beattie

38a

MILITARY POLICE DESK BLOTTER
For use of this form, see AR 190-45; the proponent agency is Office of the Provost Marshal General.

DATE (From 0001 hours to 2400 hours) 24 FEBRUARY 1972

PAGE NO.

INSTALLATION DESIGNATION
PROVOST MARSHAL DIVISION, FORT DIX, NEW JERSEY

NO. OF PAGES 8

ENTRY NO.	TIME	SUMMARY OF COMPLAINT, INCIDENT, POLICE INFORMATION	SUMMARY OF ACTION TAKEN	ENTERED BY
13	2130	ILLEGAL DISTRIBUTION SUBJECT# 1 - CUNNINGHAM, Michael J., CIV, SSAN: Unk. Upper Darby, Pa. SUBJECT# 2 - HARDEY, Alan E., CIV, SSAN: Unk 3605 Hamilton St., Philadelphia, PA. COMPLAINANT- GRACIA, Angel L., 1st SGT, SSAN: 110 24 1101 Transfer Processing Co, FDNJ. WITNESS - PRINCE, Cecil F., 1st SGT, SSAN: 262 04 0649 D-3-2, FDNJ. TIME - 2115hrs. DATE - 24 FEB 72. LOCATION - Parking lot adj to Timmerman Theater, FDNJ. (Bldg#5241) SGT P ntfd this ofc by telephone that at the above time, date and location he and WITN observed SUBJ# 1 & 2 placing anti-war demonstration posters on the windshield of the (CONTINUED)	DA Form 19-32 (FD-0585-72) initiated; SUBJs given letters of Fjection and issued citations; CASE# A015045 & CASE# A015044. Action on SUBJs is pending. PMDO(KAMINSKI), PMI(NICKELS) ntfd. SUBJ'S were escorted to Pemberton Post Boundires by MP Patrol. FBI Trenton (BUNTZ) ntfd declined jurisdiction.	

DA FORM 19-32

FPO 6. GOVERNMENT PRINTING OFFICE: 1969 O-

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81

Affidavit of D.G. Beattie — 29a —

MILITARY POLICE DESK BLOTTER
For use of this form, see AR 190-45; the proponent agency is Office of the Provost Marshal General.

DATE (From 0001 hours to 2400 hours) 24 FEBRUARY 1972

UNIT OR STATION DESIGNATION: PROVOST MILITARY DIVISION, FORT DIX, NEW JERSEY

PAGE NO. 3 OF 5

ENTRY NO	TIME	SUMMARY OF COMPLAINT, INCIDENT, POLICE INFORMATION	SUMMARY OF ACTION TAKEN	ENTERED BY
13	Cont'd	parked vehicles. CAR# 1,(CUNNINGHAM) disp, apprehended SUBJ# 1 & 2, advised them of their rights under 5th Amendment and transported SUBJs to PMD, FDNJ. Item nr# 13 is the last blotter entry for my tour of duty ending at 2230hrs, this date.	A.L. Rodriguez SSG A.L. RODRIGUEZ, D/SGT	
14	2300	Ref DE#13, this date, ILLEGAL DISTRIBUTION SUBJECT#1: CUNNINGHAM, Micheal J., Civ SSAN# 185-30-9315 126 N. Pennock Ave. Upper Darby, PA. SUBJECT#2: HARDY, Alan E., Civ SSAN# 120-32-9855 3605 Powelton Ave. 3rd Floor Philadelphia, PA. Further investigation revealed that the (2) SUBJ'S had given erroneous information about their SSAN numbers and address's. SUBJ'S later revealed thier correct SSAN numbers & address's to the Duty Officer, Cpt Kaminsky, PMDO.	INFO OPNS	ROSTER

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Filed October 4, 1972]
[Title Omitted in Printing]

AFFIDAVIT OF D. G. BEATTLE
MAJOR, UNITED STATES ARMY

Now comes the affiant, D. G. BEATTLE, Major, United States Army, and says:

I am the official custodian of the document attached hereto which is a true and correct copy of a portion of the military police blotter, dated 17 August 1972, at the Provost Marshal's Office, Fort Dix, New Jersey, which we have on official file.

/s/ D. G. Beattle
D. G. BEATTLE

Sworn and Subscribed before
me this 3rd day of October, 1972

/s/ Worth T. Haithcock
WORTH T. HAITHCOCK
CPT, Judge Advocate General's Corps
Authorized to Administer Oaths
Pursuant to 10 USC 936

~~Affidavit of D.G. Beattie~~ 31a

MILITARY POLICE DESK BLOTTER
(AR 190-45)

DATE (Hours in 2400 hours to 2400 hours) 17 AUG 72

PAGE

ENTRY NO.	TIME	SUMMARY OF INCIDENT, ACTION TAKEN, AND DISPOSITION	REMARKS (Time of Notification, Time Investigator Arrived, Time Completed, Results of Investigation, Time Subject Released, Name of Person Released To, Etc.)	ENTERED BY
14	1710	ILLEGAL SOLICITATION:	DA Form 19-32 (FD-2432-72)initated.SUBJs rel to own custody off post.	STEWART
		SUBJECT #1 [illegible], Donald A. CIV SSAN: 3[illegible]-40-0388 443 Chestnut St. Phil PA		
		SUBJECT #2 GILMORE, John H. CIV SSAN: 279-38-0327 1909 Medford Rd, Wynnewood PA.		
		WITNESS #1 [illegible], Jon (IMI) CIV SSAN: 146-36-1270 161 Harvey St Phila Pa		
		WITNESS #2 [illegible], Thomas J.CIV SSAN: 105-38-7828 West Chester PA.		
		PRIOR RECORD: None on files in this ofc		
		TIME: 1700 hours		
		DATE: 17 AUG 72		
		LOCATION: Wrightstown Parking lot FDIJ		
		CPL #11(KRAVE) ntfd this ofc in person with SUBJ #102 in custody stating that at above time and location he observed SUBJs soliciting [illegible] CPL #11 apprehended SUBJs,advised them of [illegible] and transported to FDIJ, SUBJs were formal Notified of ofcs.		

DA FORM 19-39

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Title Omitted In Printing]

HEARING ON ORDER TO SHOW CAUSE
RE PRELIMINARY INJUNCTION

October 6, 1972

Before:

Honorable CLARKSON S. FISHER, U.S.D.J.

Appearances:

HERBERT J. STERN, United States Attorney,
By: RICHARD W. HILL, Assistant U.S. Attorney,
For the Government.

BALL, BROEGE, FOGEL & WEINGLASS,
By: JEFFREY E. FOGEL;
KAIRYS & RUDOVSKY (Pennsylvania Bar),
By: DAVID KAIRYS,
Of Counsel.

Reported by:
Lynne T. Attardi, C.S.R.,
Ashley B. Carrick, C.S.R.,
Official Court Reporters.

[2] THE COURT: Spock v. David; ready?

MR. KAIRYS: It is, your Honor.

THE COURT: Is Mr. Hill here?

MR. HILL: Yes, your Honor.

MR. FOGEL: Good morning, your Honor. My name is Jeffrey E. Fogel from the firm of Ball, Broege, Fogel & Weinglass, a member of this Court from the State of New Jersey, appearing here for the purpose of introducing Mr. David Kairys to this Court. Mr. Kairys is a member of the Bar of the State of Pennsylvania, the Eastern District of Pennsylvania, and the 3rd Circuit Court of Appeals, a member in good standing and of

good character; and I ask the Court to move his admission for the purposes of this matter.

THE COURT: Pro hac vice?

MR. FOGEL: Yes, sir.

THE COURT: I know Mr. Kairys. The motion is granted.

MR. FOGEL: Thank you, your Honor.

MR. KAIRYS: Thank you, your Honor.

THE COURT: What can we stipulate?

MR. KAIRYS: Well—

THE COURT: If anything.

MR. KAIRYS: As I understand it, your Honor, [3] Mr. Hill and I are prepared to stipulate that the letters marked Exhibits 1 and 2—

THE COURT: Attached to the complaint?

MR. KAIRYS: —attached to the complaint, the letter requesting to be admitted to the Base for the purpose of campaigning written by the four candidates, and the letter in response from the Base, were in fact written and are authentic, and, secondly, as to the candidates, that Plaintiffs Spock and Pulley did attempt to enter the Base on foot as described in the complaint and were refused to enter and, hence, prohibited from entering the Base.

We can stipulate as to plaintiff Hardy that he was, as described in the complaint, leafletting announcements of anti-war demonstration outside of McGuire Air Force Base. He was on the parking lot, and he was placing the leaflets on the cars.

As I understand it, Mr. Hill will not stipulate that he was peacefully leafletting, although there is nothing in his records to indicate that it was anything other.

MR. HILL: Your Honor, for the purpose of this hearing, we'll stipulate that at this time Mr. Hardy was peacefully—

MR. KAIRYS: You will?

[4] MR. HILL: —placing leaflets on windshields of cars in the parking lot adjacent to Timmerman Theatre in the heart of Fort Dix.

THE COURT: Fort Dix? You mentioned McGuire Air Force Base.

MR. KAIRYS: That was as to the leafletting. The leaflet announced the demonstration, the upcoming demonstration at the McGuire Air Force Base.

MR. HILL: We will also stipulate, your Honor, that the plaintiffs, John Ginaven and Donald Misch, were given Bar notices as set forth in Exhibit B attached to the complaint. Exhibit B is only Bar notice as to the plaintiff Ginaven but a similar Bar notice was received by the plaintiff Donald Misch.

Similarly Alan Hardy was given the Bar exhibit which is set forth in Exhibit E, which is annexed to the complaint.

Defendants are unable to make any stipulation with respect to the plaintiff Robert Stanton because his claim dates back to December of 1968—rather still in our opinion—and we have no records on that at this time and there is no foreseeable reason we believe we'll be able to find it.

THE COURT: Is he a necessary party?

MR. KAIRYS: He is here and he is ready to [5] testify about that occurrence.

THE COURT: I don't know how it is going to help me as far as his presence—

MR. KAIRYS: He has an outstanding Bar notice. He has been informed if he goes on the Base he is subjecting himself to six months.

THE COURT: Does he have it with him?

MR. KAIRYS: It is annexed to the complaint.

THE COURT: You can't stipulate to that?

MR. HILL: I don't know. It looks like that's what he received and for the purpose of this hearing—

THE COURT: I am just trying to whittle this testimony down to where we could come to grips with the problem.

MR. HILL: The Bar notice looks authentic, and for the purpose of this hearing we will agree that he received it.

THE COURT: Okay.

MR. HILL: In December of 1968.

THE COURT: And what was that plaintiff's name, again?

MR. KAIRYS: Stanton.

MR. HILL: Hardy.

THE COURT: Oh, no. You have already stipulated [6] that.

MR. KAIRYS: Stanton.

THE COURT: Stanton.

MR. KAIRYS: Robert Stanton, your Honor.

MR. HILL: Excuse me, Robert Stanton. That Bar notice is dated.

MR. KAIRYS: Mr. Hill, there is one other exhibit attached to our complaint, Exhibit D, which is a copy of Regulation No. 210-26, Fort Dix. Can we stipulate that that is an authentic copy of the Regulation and that that Regulation is in effect?

[7] MR. HILL: Yes, and we also stipulate that the regulations which I served on you with our brief and provided the Judge are the regulations which are in effect.

MR. KAIRYS: Certainly.

Your Honor, Exhibits A to F annexed to the Complaint have been marked as Plaintiffs' Exhibits 1 through 6.

THE COURT: Without objection.

MR. HILL: Without objection.

MR. KAIRYS: Your Honor, I would like to make a brief opening statement just to clarify why we are here and why we are not here, and certainly if Mr. Hill wishes to respond—

MR. HILL: I was going to say while we are on the stipulation at this point I would ask the Court to consider, since this is an application for a preliminary injunction, the affidavit submitted on behalf of the defendant in this matter, four affidavits, one of Colonel French, one of Colonel Olsen, and two other captains, authenticating certain military police matters.

THE COURT: They are filed in the suit?

MR. HILL: Right.

MR. KAIRYS: Your Honor, in the papers I [8] received from the Government a number of what I consider nonissues are raised, and I would just like to state what I think they are and what issues are not.

The Government has claimed that you cannot issue a preliminary injunction on quite a few grounds, mainly seemingly based upon the fact it would be a mandatory injunction, as they call it. Now, I have never understood the difference between a mandatory injunction and a prohibitive one. One is supposed to be affirmative and one negative. You can frame it either way. You can say they can't stop him from going on the base or they must let him go on the base. Either way it is the same result.

In any event, as is clearly the law, notwithstanding the one decision on the arbitration act cited in Mr. Hill's brief as set out in Paragraph 65.04 of Moore's Federal Practice, it seems that the status quo is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from.

In such a case courts of equity issue mandatory writs before the case is heard on the merits, so [9] whether it is characterized as mandatory or preventive, it is clear that the Court has power to do that.

I would also point out that Rule 65(a)2 of the Rules of Civil Procedure specifically spell out that after a preliminary injunction is issued or even before the hearing on that injunction can be consummated and can become the whole trial of the case—

THE COURT: If there is no more testimony and proofs to be offered—

MR. KAIRYS: Right. Moore also indicates it is important as to whether such an injunction should issue that the writ may be defeated in the event the injunction is not issued, which is the circumstance here.

THE COURT: All right.

MR. KAIRYS: The second thing is the Government complained we have not verified our Complaint, and we don't have affidavits. We are not seeking any injunction based on paper work, on affidavits, or allegations. We have asked for a hearing at which your Honor will hear both sides, and whatever witnesses under sworn testimony would be offered by both sides, so that a verified [10] Complaint and affidavits are not necessary, so I

don't want to get into a hassle about whether my affidavits on the preliminary injunction is complete.

THE COURT: Don't worry about that.

MR. KAIRYS: I'm not going to summarize our argument, but I will wait for the end. I would like to point out what I think is the real issue. Given the Flower decision I think the issue is whether the Fort Dix Army Base is an open base pursuant to that decision, and that I think is the crucial fact in this case, and the fact is that we hope to develop testimony that it is in fact an open base.

THE COURT: Is that what your proofs are going to go to?

MR. KAIRYS: Mainly. We also have to prove the other instance, because there is no stipulation.

THE COURT: I have read your brief and know your position.

MR. HILL: Just one brief point, your Honor. The United States believes that the major case for your Honor to consider is the Flower case, but I don't think we can narrow or limit the question as to whether the base, Fort Dix, is open or closed. [11] The word "open" and the word "closed" are simply conclusions. I think we have to look at the specific facts, and we can't deal with conclusionary language. Simply I think we have to look very carefully at the circumstances under which the Flower case was decided before we can make any judgments as to how far that case should be extended.

I will represent later in my final argument, after the conclusion of any arguments that plaintiff has in this matter, that this matter should be severed, that is, there should be a severance between the plaintiffs who are candidates for national political office and the plaintiffs who merely wish to distribute literature on the base.

MR. KAIRYS: May I proceed, your Honor?

THE COURT: Yes.

JASPER R. JOHNSON, examined on behalf of the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. KAIRYS:

THE COURT: Are you a light colonel?

THE WITNESS: Colonel.

Q Colonel, where are you now stationed?

[12] A Fort Dix, New Jersey.

Q Are you here to respond to the subpoena of the commanding officer of Fort Dix?

A I am.

Q And you were designated by him as his representative to respond to that subpoena?

A Yes, I am.

Q Colonel, would a campaign addressed by a candidate for President of the United States interfere with military activities on Fort Dix?

MR. HILL: I object. This was not within the grounds or scope of the testimony which the subpoena addressed itself to. We have been given a specific list of questions and asked to produce an officer who would be prepared—a competent officer to testify on that particular ground.

We could have produced another witness. This is not within those questions, and I do not believe that Colonel Johnson is an appropriate officer to whom such a question should be directed.

MR. KAIRYS: I subpoenaed the commanding officer of the defendant. In this case I specified on the subpoena that he could send a representative, and I also specified, so we would save time, some of the questions that I intended to ask. I wanted [13] him to bring certain information with him concerning for instance how many personnel live on the base, things like that. I specifically said they would be requested inter alia to answer the following questions. If you like, I will supply you with a list.

THE COURT: That doesn't disturb me as much as how could he possibly answer that if it has never happened.

MR. KAIRYS: That is their main argument. It interferes with the base. I want to know how.

THE COURT: In his opinion how it would?

MR. KAIRYS: He's a representative of the commanding officer. That is how he was subpoenaed.

THE COURT: All right.

BY MR. KAIRYS:

Q Can you answer that, Colonel? It's a pretty broad question.

A Would you repeat the question, please.

MR. HILL: May I be heard on one more point. We specifically submitted an affidavit by Colonel French on this very point, and again we were honestly attempting to comply with plaintiffs' subpoena in this matter, and I think it is unfair to permit this officer, who is brought here to be a fact witness, to state opinion. This man has not been [14] subpoenaed as an expert witness.

THE COURT: Mr. Hill, I don't know how we're going to get along if you object to every question, but you do that if you think it's necessary. If the question is too broad—and I can see it might be—if he has no opinion he can say that. I think the colonel can take care of himself.

Reask the question.

Q Colonel, would a campaign address by a presidential candidate or vice presidential candidate for national office interfere with the military mission at Fort Dix?

A I think it could lead to interference.

Q Why?

A First of all, the policy at Fort Dix is nonpartisan as far as political parties are concerned and we try to stick to that rule. It doesn't matter whether it is the Whig party, the Tory party, the Socialist party, the Republican party or the Democratic party.

Q Is that all?

A No. I have not finished.

Q Go right ahead.

A It's a very broad question. I can see if you let one party in, no matter what their conduct is, it could

[15] lead to other parties coming on and causing all kinds of problems which would lead to something that would interfere with the mission on the post.

Q How would that interfere with the mission on the post, assuming these candidates were willing to comply with reasonable regulations as to time and place that they come on the base?

In other words, assume the candidates are told on a date they suggested that there was a convoy coming through that day, or that there was a particular situation where a particular suggested date for such an address was not good for the Army, and suppose they would comply with that kind of reasonable regulation as to time and place of such an address, how would it then interefere?

A Well, it would be very difficult to say, like going into many, many ramifications that I'm not prepared to answer, since we have never had or permitted anyone to come on the base like this.

Q Tell me, soldiers on the base, are they free on the base to read books?

A They can read a book.

Q Can they read newspapers?

A They can read a newspaper.

Q Can they watch TV?

A Yes.

[16] Q Listen to radio?

A Yes.

Q Play sports?

A Yes.

Q Can they discuss issues that they read in books or hear on television or any of these things? Can they discuss them among themselves?

A Surely.

Q Can they just lounge around some of the time?

A When they are off duty.

Q Right. Doesn't this, does the fact that they read books, newspapers, listen to television and radio, play sports, discuss things, and just hang around, does that interfere with the military mission?

A Not when they are off duty, depending on whether they draw crowds or what have you. We're talking about an individual discussing with another individual. I think that's quite common.

Q Are you familiar with the Army Times newspaper?

A Yes, I am.

Q Under whose auspices is that published?

A To the best of my knowledge it is a private concern, a private publisher.

Q Is it generally available on the base?

[17] A Yes, it is.

Q Do the soldiers read it? Are they encouraged to read it?

A I can't say they are encouraged to read it. They do read it. It is available just like any other newspaper.

Q Are they permitted to consider what it discusses, to think about it and discuss it among themselves, what might be said in the Army Times?

A I am sure they are.

Q Does that interfere with the military mission, the fact that they can consider and read and discuss the Army Times and whatever it raises?

A No, not if they're discussing it without having a congregation or inciting any riots, just like you and I are talking now. It's fine.

Q We're not talking about presidential candidates inciting any riots either.

MR. HILL: May we have a brief two seconds recess?

THE COURT: Yes, sir.

MR. HILL: Thank you, your Honor.

MR. KAIRYS: Your Honor, could there be marked as plaintiff's Exhibit No. 7 a copy of an Army Times dated October 11, 1972?

(P-7 marked for identification.)

[18] MR. HILL: I have no idea what relevance this would have in this particular case. We're not dealing with the right of a private newspaper to distribute a copy of a periodical on the post.

MR. KAIRYS: The relevance will be very clear very shortly.

THE COURT: I will permit it because the case has to be reviewed. Whether or not I consider it will be different.

Q Can you identify this, Colonel, Exhibit P-7?

A It's an Army Times dated October 11, 1972.

Q Would you turn to page 15, please. What is on that page 15?

A Do you want me to read it?

Q Yes.

A "Why President Nixon is the man to watch your tax dollars.

"When someone talks about reforming the tax structure, the first question that comes to mind is: How? President Nixon says reform must be broad based, very fair, very equitable. Senator McGovern wants to go far beyond that. He wants to 'redistribute income.' Whose income? The middle class—hardly folks with money to burn.

"But then again, a 'President' McGovern would need [19] lots of money for running the Government. He has said he would give $1,000 to every American, whether it's needed or not. He has said that jobs should be held by everyone—even if the Government has to create them. He has a program which according to the Office of Management and Budget, would cost the taxpayers $150,000,000,000 above what is being spent today.

"Extravagant, to be sure. Senator McGovern's extravagance does not extend to the military. That's one area in which he talks about budget cuts—32 billion worth of cuts. One result of these would be the closing of some 500 bases in a single year.

"So under George McGovern the serviceman and his family face the prospect of a closed base—a higher tax burden—a militarily weak America—and who knows what else?

"President Nixon—now more than ever? It's something to think about.

"Here's how to vote for President Nixon: Contact your unit voting officer for your federal post card appli-

cation (FPCA—standard form 76). Your voting officer will answer your questions.

"President Nixon now more than ever.

"Paid advertisement published and paid for by the Finance Committee to Re-elect the President."

[20] Q How big is that advertisement? Does that take in the entire page?

A It takes this page, yes (indicating).

Q Will you show that to his Honor?

THE COURT: Do you think that the Senator is going to demand equal time?

MR. KAIRYS: I don't know, your Honor.

BY MR. KAIRYS:

Q Colonel, does it interfere with the military mission for soldiers to read Page 15 of that exhibit?

A Not to my knowledge.

Q Is it—

A I really can't say.

Q Is it disruptive? Would it disrupt things if soldiers read that?

A I don't believe so.

Q How about if they thought about it and talked about it to each other? Would that disrupt things?

A I don't believe so.

Q All right. And if they gathered in a group and discussed it, would that disrupt things, assuming they are not going to do their duty?

A It all depends on their intent.

Q Well, what intent would make it disruptive for them to gather in their offtime and discuss Page 15 of that [21] newspaper?

A Oh, I can think of situations where it all depends on who they are, what they are trying to accomplish. If it becomes a partisan-type thing, then it certainly is not going to help on non-partisan policies.

Q Is that a partisan or non-partisan?

A I would say that it is very partisan.

Q It is?

A Uh huh.

Q Is it political or non-political?

A Obviously.

Q Obviously what? It is political?

A Yes.

Q Are you familiar with the Regulation cited on behalf of the Commanding Officer who you are here to represent that speaks of prohibiting service personnel from participating in partisan politics? Are you familiar with that Regulation?

A Generally.

Q To your knowledge, would that Regulation be interpreted by the military to include someone who would read Page 15 of that newspaper, think about it and discuss it? Is that participating in partisan politics?

A Well, in my own opinion, no.

Q Okay. Then would it make any difference if [22] they listened to a candidate, whether it be President Nixon, Senator McGovern, Dr. Spock or Linda Jenness, listened to what they had to say and thought about it, and perhaps discussed it with other soldiers?

A They can go off post and listen to it.

Q Well, whether or not it was off-post, would it interfere with the military mission? Would it be disruptive?

A It could be, depending upon the circumstances.

Q Any more or less than this could be?

A This is a piece of paper.

Q That's right.

A This does not attract crowds.

Q Are you saying, then, that it's only the spoken word that may interfere with the military mission, not the printed word?

A I am sure that people can listen to it over the radio. They can hear it on TV, and if it's not—

Q They do; don't they?

A Yes.

Q They do; don't they?

A Yes.

Q Don't they regularly watch television?

A I can't say they regularly watch it. They are usually pretty busy.

Q Aren't there campaign shows on television?
[23] A I'm sure there are.
Q For various candidates?
A Various candidates.
Q Did you ever hear on television, the Peoples Party?
A I can't say I heard.
Q Did you ever hear one for the Socialist Workers Party?
A I can't say that I have.
Q Well, then, if it's not in interference with the military mission for that newspaper to be on Base with that Page 15 in it and for the soldiers to read that, to think about it, to talk about it amongst themselves, why is it interference with the military mission for a candidate from another party to come on peacefully at a reasonable time and place and speak to them?
MR. HILL: Your Honor, this question has already been asked.
THE COURT: Well, it's obvious. Do you want him to answer it? It's obviously a different situation.
MR. KAIRYS: I'd like to see why he thinks it is.
THE COURT: All right.
MR. HILL: I think he already answered it.
[24] THE COURT: I can see why.
A Well, it is a completely different situation than this. Generally it is not analogous.
Q And why is that? Is it just the fact that it's the spoken word and a crowd might gather?
A As I pointed out before, we in the military, especially Fort Dix, try to remain non-partisan as far as political parties are concerned, any political activity is concerned.
Now, when we have the gathering of crowds or bringing in an individual there you could possibly cause a gathering of crowds, this could hurt our mission.
Q If the time and the place of such gathering is known, it can be peaceably accomplished, can't it, as it could anywhere in the middle of a city? Senator McGovern and President Nixon have both visited the city of Philadelphia and have had peaceful rallies. Is that impossible to do on a Base?

A It may not be impossible, but we can't let one do it and not let another. So we still have to remain non-partisan.
Q Well, are you non-partisan by allowing circulation of Page 15 of that newspaper?
A Oh, I think so, because we have the New York Times. We have Playboy. We have all types of newspapers and magazines that anybody can read.
Q But what if a candidate wants to come and speak [25] in person? What if a candidate can't afford to buy television time, can't afford to buy ads in newspapers or ads in Playboy Magazine, or doesn't want to buy ads in Playboy Magazine? What then?
A What about it?
Q How can they be heard?
A Well, it can't be heard in Fort Dix because of our non-partisan policy, not in person.
Q I am not asking what the policy is. We all know the policy. What's the reason for the policy?
A Well, because we in the military must remain non-partisan. That's the policy that's been announced. That's the policy that we have to follow. We are just an instrument of that policy. That's all. We don't make it. We don't—all we do is carry it out when we are required to do so.
Q Are military personnel encouraged to vote?
A Yes.
Q Are they encouraged to vote intelligently—by that I mean to listen to candidates and to make up their minds?
A We encourage the men to vote. That's all.
Q But you don't allow candidates to speak to them on the Base?
A No. A man can go off the Base and hear candidates, [26] if he so desires.
Q Not if he's restricted to the Base?
A No, not if he's restricted.
Q And many persons are restricted to Fort Dix, are they not?
A Well, how do you mean "many"?

Q Well, you tell me. Are there a lot—are there a lot of men restricted?

A In my estimation, there are not a lot of men restricted. No, "restricted" has many connotations, you know.

Q Are you not restricted for the first month or so in your basic training at Fort Dix, restricted to the Base?

A Primarily because of training.

Q So you can't go off the Base?

A Well, Wrightstown is also full.

Q Well—

A A man is not given a weekend pass and this sort of thing for the first four weeks. After the first four weeks he is given a pass to go home. But he can go in to Wrightstown. He can go in to the USO in Newark or any place else.

Q Okay. Let me just finish up then in this area with one question. What possible interference with the [27] military mission would be accomplished by on one given day setting aside a time and a place reasonably chosen by the military for any political candidate who wanted to address the soldiers to come on to the Base and do it?

A Well, I will repeat again: We cannot permit it because of our non-partisan policy.

Q Besides the non-partisan policy, what effect would it have on the military mission in Fort Dix? Would it interfere with it?

A It certainly could lead to it.

Q Any more than that ad?

A A little more so.

Q Why?

A Because of the possibility of creating crowds, enticing riots, and what-have-you, which would be a violation of military discipline, law and order.

Q You just said that it was okay for soldiers to discuss that ad now in a newspaper, that that's okay. Now, does that have the possibility of creating a crowd, of starting an argument, of starting trouble?

A Not likely.

Q Why not likely? What if one of them is for Senator McGovern and one of them is for President Nixon

and one of them is Dr. Spock and wants to know why his candidate can't be heard at all? Why is that any less [28] the possibility of trouble rather than gathering to hear candidates?

A It's not likely. Anybody can have a fight over anything. It could be a spontaneous thing. If it's not planned.

Q All right. Are you familiar with the orientation program for the soldiers on the Base?

A I have a general knowledge.

Q Are they told that the Base is open or closed?

A I don't know that they are told that it is closed or open either.

Q You don't know?

A No. I am told that they can invite their parents down and their friends.

Q Are you familiar with any advice that might be given concerning being absent without leave and the fact that they—the fact that they can leave the Base since there are gates, without being seen? You are not—Are you familiar with that orientation program or not?

A Not with that, no.

Q Okay. Colonel, with respect to the specific questions on the subpoena, I understand you came prepared to answer questions Nos. 3, 4, 5, 8 and 9; is that correct?

A That's right.

Q Okay. Question 3 was, or it concerned the kind [29] of business concessions, et cetera, by civilians on the Base. Now, is there any?

A There are concessions, yes.

Q What are they?

A We have an optical shop. We have drycleaners establishments, beauty parlor, barber shops. We have what we call canteen items. These are called vending machines.

Q These are all provided by private concerns that have concessions with the Base, have contracts?

A They do have concessions, yes, sir, that is correct.

Q And they then come on to the Base to discuss business, say; before they got their concessions they

would presumably have come on to the Base to discuss this with someone at the Base?

A Yes. They are invited to come on.

Q Okay. And they discuss business then with the soldiers that they deal with?

A No, they do not.

Q Or the military. Well, isn't it in a sense of selling their wares, in their concession?

A Well, they are there to provide a service, yes.

Q Right, and they would discuss the provision of that service with soldiers?

A Yes, sir. If a man wanted his shoes repaired, they talk about having his shoes repaired, I presume.

[30] Q So soldiers are permitted on the Base to discuss business matters if there is an appropriate business matter?

A You can't say that.

Q Well, why is that wrong?

A It is pretty broad.

Q I am saying: Some civilians are permitted on the Base to discuss business matters?

A Yes, some civilians are invited on the base to discuss business matters.

Q Now, if anyone—if myself, if I went on to the Base and was interested in providing a concession and went to the Commander's office and said, "I'd like to inquire about providing this concession," have I entered the Base illegally, doing that?

A Unless you've been invited, you might say illegally.

Q What makes it illegal?

A Because you are supposed to call and have an appointment. We have a Regulation to this effect.

Q Is there anything at the entrances to the Base that says that—that no one is admitted unless invited?

A I don't really know. I don't think so.

Q Is there a sentry—are there sentries at the entrances who would check to see if I had an invitation?

A Not all the time, no.

[31] Q Usually?

A Occasionally.

Q Occasionally?

A Uh huh.

Q What kinds of occasion? What kinds of occasions are there sentries?

MR. HILL: Your Honor, I have an objection to that question because I did advise Mr. Kairys before the hearing that with respect to access, with respect to presence of sentries, that the Provost Marshal is here to testify specifically in that area.

THE COURT: All right.

MR. KAIRYS: Fine. We'll wait for that. I will withdraw the question, your Honor.

[33] Q Does that interfere with the military mission?

A No, that would not.

Q Does the possibility of a problem subject there with music, with a dance?

A That's perhaps a possibility. There are always possibilities.

Q What sort of bands are these that come in?

A Most of these are USO sponsored type bands.

Q I see. There is a rock concert coming up soon; isn't there?

A No.

Q No?

A No.

Q Are there not signs on the base?

A It was cancelled last night.

Q It was cancelled last night?

A Yes.

Q Why was that?

A One of the rock outfits didn't show—wasn't going to show.

Q Where are these rock concerts held? Where would they have been held?

A Are you familiar with the post?

Q Slightly. If you have a map and would like [34] to show it, that's fine.

A Well, it's by the sports arena.

Q By the sports arena?

A Yes, uh-huh.

Q And how many people do you estimate would gather for such a thing?

A Well, we could accommodate, oh, maybe up to 5,000.

Q You could?

A (No response.)

Q And would they be dancing?

A Well, let's put it this way: They might be, but certainly not intended for them to be dancing.

Q But it could happen?

A Possible.

Q What other kinds of bands or entertainment groups? You say they were provided by the USO; is that right?

A Most of them, yes.

Q Has anything like the Bob Hope troupe come onto the base?

A To my knowledge, no. Now, I've only been there since the 6th of June this year, so I can't tell you.

Q Oh, I see. All right. Perhaps I'll save that then for Colonel Olsen, since he's been there longer.

All right. Go on then. What other kinds of [35] gatherings or meetings are there?

A Well, we have quite a few guest speakers at the chapel, individuals, in furtherance of our religious program. We have business people come down to address our Middle Managers Association, and all of these type meetings are to improve training of supervisor administrators. Of course, we know the subject before they ever get there and what they are expected to discuss. We've had alcohol and drug abuse workshops.

Q There are civilians coming on to address?

A They invited these people, pretty well known individuals who are specialists in the field.

Q Let's be more specific. You said there are speakers about religion. Can you give us some examples of who they are, when and where they spoke, and what kind and size of audience they spoke to?

A I can only estimate the audience. May I refresh my—

Q Certainly.

A We had Father Richard Bartley who conducts the Spanish Mass at Fort Dix every Sunday. And we have a Father James Lloyd, who speaks on the World Day of Prayer. And we had the Alpha—let's see—Omega Players from Dallas, Texas, which presented religious drama at the chapel. I'd say if the chapel was full, it would probably [36] be—I'm just estimating now. I really don't know—about 500 at the most.

Q They don't draw as good as the rock concerts?

A I would say no.

Q How about the business speakers? Who were they?

A We had a Mr. W. Earl Masincup. He's assistant director of civilian personnel department of the Army.

Q What did he speak about?

A Position management.

Q Position management?

A Uh-huh.

Q What kind of an audience did he speak to?

A These were what we call our Middle Managers. They are our civilian supervisors, some of our military supervisors.

Q Okay. And what other speakers?

A We had a Mr. Philip Oliver. He's a director of job evaluation and pay review task force for the U.S. Civil Service Commission. He spoke on the job evaluation and pay review.

Q How many people did he speak to?

A Oh, I would estimate no more than 30. That is usually in conjunction with a luncheon.

Q Okay.

[37] A We had a Lieutenant John Harms, New York State Police. That's narcotics. He spoke to Fort Dix—

THE COURT: Excuse me. New Jersey State Police.

THE WITNESS: New Jersey State Police, yes. Then—

THE COURT: I know Harms. That's the reason.

A We have staff members of Rutgers University on a conference on emergency preparedness for public officials.

Q What was that conference about, emergency preparedness for what?

A Well, I really can't tell you since I wasn't there, but I can only assume what officials would do in cases of actual emergencies in the United States, like if you got a flood and what have you.

Q I see. How about the alcohol and drug abuse workshop you mentioned? What people came in for that?

A The individuals?

Q Yes.

A We had a Mr. William Moore, who is the executive director of the National Council on Alcoholism. We had Dr. Abraham M. Schneidmuhl, who was a director of alcoholism, general Baltimore, Maryland, city health department. We had Father Joseph C. Martin, Division of Alcoholism Control, Baltimore, Maryland. We had a [38] Mr. Sanford Farrand, who is a program consultant, occupational alcoholism programs branch, National Institute of Alcohol Abuse and Alcoholism.

Q Is this the same day?

A The same day. Two days. Two days.

Q And how many people attended that?

A Well, there were about 50.

Q Where was it held?

A It was held in the service club. It was for all of the staff officers there at Fort Dix and all the commanders, to make them aware of the drug and alcohol problems that we have.

Q So there are facilities for various size crowds, 30, 50, 5,000?

A Well, if you can call the ball field a facility, you know, where you sit on the ground.

Q Yes.

A Okay.

Q And those kinds of gatherings happen?

A These did, yes.

Q Is it fair to say that people fairly regularly visit the base, civilians, to convey certain types of information to people on the base?

A When invited.

Q Military?

[39] A To do so.

Q Military personnel?

A And when in furtherance of our mission.

Q Is it not in furtherance of your mission, the information that perhaps Dr. Spock or Julius Hobson or Linda Jenness or Andrew Pulley—is the information they would convey not in furtherance of your mission?

A Well, in my opinion, I can't see where theirs or anybody else's is a political nature.

Q Is it any less in furtherance of your mission in page 15 of that newspaper?

THE COURT: Haven't you made that point, Mr. Kairys?

MR. KAIRYS: I want to get at whether he's talking about the contents of what they are going to say, your Honor.

A This is not in furtherance of our mission, no.

Q Now, you said at the beginning that you don't keep track of all meetings; is that right?

A Of all what?

Q Meetings and gatherings.

A No, I don't think so. In the Army we have a system of records retirement. Certain records are maintained in the depository two years, after two years, depending on the cut-off date. Others are destroyed that [40] no longer have any value.

Q Wouldn't there be the possibility and in fact the recurrence of many informal meetings which are never recorded in any way, say, someone comes on to speak to the officers in charge of the concessions, as I said I might do, or someone comes in or is driving through and stops in at the cafeteria and has lunch and meets and talks with some people there?

Doesn't that happen?

A I'm sure that business men who have concessions come on and talk to PX people.

Q And there is no problem with that?

A No, because there is a contract. He's concession. He's authorized.

Q Is it a problem with people who are driving through the base in order to get to the other side stopping at the cafeteria and having lunch; while they are having lunch, chatting with military personnel who are also having lunch?

A It all depends on the purpose. They are not invited to do so.

Q Is it illegal?

A It would be illegal in my opinion, yes.

Q It would be illegal for someone to do that?

A Yes, because they haven't been invited.

[41] Q Okay. Did you bring information on any other meetings and gatherings?

A This is it primarily.

Q Okay. I mean, I don't want more details of the same kind of thing. Any meetings or gatherings of another nature?

A No.

Q Okay.

Question 5: "The number of military personnel living on the reservation."

Do you have that?

A Yes. Now, approximately 22,000.

Q "Number of dependents of military personnel living on the reservation."

A Just a little over 6,000.

THE COURT: Colonel, I'm a little confused. On that first figure you say 22,000 living there. Does that mean people who are officers and noncoms or residents, or does this mean—

THE WITNESS: Well, there are probably—approximately 22,000 military who work there. Now, most of them live on the base because most of them are trainees or in transit and what have you. There are some officers and some enlisted personnel who do live off base. I don't know that number.

THE COURT: 6,000 people who are part of [42] family units; is that right?

THE WITNESS: There are 6,081 as of 30 September who are part of family units living on the base, give or take a few.

THE COURT: All right.

Q Okay. And the number of civilians employed on the base?

A Approximately 2600.

Q The number of civilian employees who are living on the base; are there any?

A There is one civilian employee who lives on base.

Q Who is that?

A Mr. Hernden, who is with the Chief Utilities and Pollution Control Division of Post Engineers. He's there because of emergencies in the utilities.

Q Does he have any dependents living on the base?

A Three.

Q Three. Okay. All right.

Item No. 8: "Government regulations applicable to the reservation concerning voting by military personnel and any information and advice concerning voting provided to military personnel or their dependents."

Did you bring any such information with you or is there any?

[43] A Yes. There is some and it's unavailable. I don't have it here with me, right here.

Q What is the substance of it?

A Pardon? The substance of it is that inform the soldier of his right to exercise his franchise of voting, you know, and tell him how he can do it by absentee ballot or whatever it is, whatever method he chooses.

Q Is he encouraged to vote?

A He's encouraged to vote to exercise his franchise, that's all.

Q Is he referred to any agency for assistance about voting and about registration?

A He's referred primarily to our post voting officer in case he has a question that's not mentioned by the information that we put out to each individual.

Q There is a post voting officer?

A Yes, there is.

Q Who is that?

A Lieutenant Bell.

Q Are you familiar with Lieutenant Bell's duties?

A Yes, sir.

[44] Q Could you explain this, what he has to do if someone comes and says, "I want to vote, what should I do?"

A He would explain how to go about it.

Q How? Would he refer him to any other agency?

A Not if he can answer his question on how to vote. We are talking about the mechanics.

Q The mechanics. I see.

A He would answer that if a soldier came to him.

Q How about if the soldier came to him and says, "I'm not sure how I want to vote," or "Where do I get information on the candidates?"

A He would advise him to go off post to get it.

Q Would he tell him where?

A If he knew where, he might tell him.

Q Item No. 9, access of military personnel and their dependents to education, to mass media including television, radio. Is there any limit to such access?

A No. We have television sets and we have radios. We have all kinds of newspapers. In the post library we have newspapers there, you know, from the major cities of the country. We have newspapers in our PX newspaper stand. We have delivery of newspapers on the post.

Q You have books, also?

A We have a library and books. We have books in the [45] library and we have books in the PX, newspapers, periodicals.

Q Might not those books and newspapers raise issues concerning the war in Vietnam, concerning the election, all the issues now before the electorate?

A Yes.

Q They do, don't they, and they express various partisan opinions, do they not?

A They do.

Q Where are the televisions, are the televisions in the barracks?

A Yes. There are televisions in the barracks. There are televisions in their homes, television in the clubs.

Q Are there also radios in the barracks?

A Yes.

Q Is there any limit on what can be watched in terms of does the set automatically go off when a political speech comes on?

A No.

MR. KAIRYS: We have no further questions at this time.

THE COURT: Mr. Hill, do you have any?

MR. HILL: Just a few questions.

CROSS-EXAMINATION
BY MR. HILL:

Q Colonel, isn't it true that you have a large number of newspapers and magazines sold on the base of [46] varying kinds which express different points of view?

A That is true.

Q Including the New York Times, the Village Voice, and Philadelphia newspapers?

A That type, yes. Yes, that is true.

Q Now, with respect to all business concessions on the base, is it your testimony that before a concession may operate on the base that it must have the approval of the Commanding Officer and it also must be invited specifically to come into the base?

A That is true.

Q And isn't it true that the concessions on the base are for the use of military personnel on the base, their dependents and civilian employees on the base?

A It is primarily for the military personnel and their dependents. There are some exceptions when a civilian employee might use it, for the barber shop, the shoe repair. They can't use that.

Q How about gasoline?

A Military and their dependents only.

Q Do they have to show some sort of identification card?

A Yes, unless they are in uniform.

Q There are PX cafeterias on the base?

A Yes.

[47] Q And do civilians sometimes come in that cafeteria?

A Yes.

Q What is the purpose of permitting civilians to use that cafeteria?

A Well, it provides several purposes. One is for dependents, two is for civilian employees who work on the post, and three for guests of personnel who invite their parents, sweethearts, friends to use it, come down and visit.

Q Is it fair to say that it is primarily used by the military?

A Oh, yes.

Q If you wanted to go into the PX on Fort Dix and were not in uniform, would you be required to show identification?

A Yes, sir.

Q If you wanted to get a haircut, would you need identification if you weren't in uniform?

A Let's put it this way: You should. You should be required to show it.

Q Isn't it true that the entertainment that is provided for the troops on the post is by invitation only?

A True.

Q And the entertainment is for the relaxation of troops?

[48] A That is correct.

Q To bolster their morale?

A Correct.

Q And in that sense it is in furtherance of the military mission of the Post?

A That would be true.

Q Now, with respect to guest speakers, isn't it true that they are only invited if it is felt that they further—their address would further the military mission of the Post?

A That is true.

Q And that the topics they are to speak on are submitted in advance?

A That is true.

Q With respect to the availability of TV in the barracks, I assume that is only during off-duty hours?

A Normally.

Q Colonel, has any candidate for political office campaigned on Fort Dix since you have been there?

A No.

MR. HILL: No further questions.

THE COURT: Any others?

REDIRECT EXAMINATION
BY MR. KAIRYS:

Q Have you ever seen a copy of a newspaper called "The Militant"?

[49] A I have not.

Q You have not seen it at all?

A No, I have not.

Q You have not seen it on sale in the Base?

A No.

Q Have you ever seen any publication in there that endorsed other than Democratic and Republican candidates?

A How do you mean?

Q I mean in terms of the upcoming presidential election. You mentioned that you saw the New York Times. They just endorsed Senator McGovern. Are you aware of any publication available on the Base that endorses or favors candidates other than the Democratic candidates and the Republican candidates?

A No, I have not seen a newspaper that endorses anybody else.

Q You said a couple of times that it is your opinion that no one is legally there unless they are invited. You came here as a representative of the Commanding Officer, General David. Has he informed you that that is the state of the law on Fort Dix, or is that your own impression?

A To be specific, no, he didn't tell me that that was the law.

Q That is your own impression?

[50] A Oh, yes.

THE COURT: What is your position on the Post?

THE WITNESS: Sir, I am the Director of Personnel and Community Activities.

Q You said that the people who speak on the Base speak on topics that the military approves?

A Yes, when they are invited down, yes.

Q So the only thoughts and ideas heard by military personnel and independents on the Base are ones that are approved by the military?

A Would you repeat that?

Q The only thoughts and ideas heard or allowed to be expressed on the Base are ones that are approved by the military, isn't that right?

A That is rather broad.

Q Tell me why it is too broad.

A That could lead to a Pandora's box as far as I can see. What I think I have tried—what I hope I have said is that if there is a speaker who can further the mission of the Base—I gave examples of personnel who addressed the middle management people—then they are invited down and it deals with something pertaining to our mission and training.

Q I see. Well, doesn't the war with Vietnam deal with your mission?

[51] A Oh, yes.

Q Well, what I guess I am trying to get at is isn't it true that the content of what a proposed visitor intends to say is the basis for whether he is allowed to come on or not? If, for instance, he says "I intend to urge the soldiers not to use drugs," that, from what you have said, would be something that the Base might favorably look on. If he is going to inform them of some management principle that they are not aware of—

A That would further our mission, yes.

Q But if they are to speak against the war in Vietnam—

A That certainly wouldn't forward our mission, would it?

Q So the content of what they are to say, that is the basis of whether or not they are approved?

A Yes, to a great extent.

RECROSS EXAMINATION
BY MR. HILL:

Q You are Director of Personnel and Community Activities, Colonel. Will you please tell the Court what that position encompasses and what your relationship is to General David in that capacity?

A It is my job in that capacity—I'll use the letters VPCA, if it's all right with you. It is shorter. I attempt to formulate and advise and recommend policy to the General as pertaining to soldiers as individuals, also dependents, [52] and so forth, as far as his welfare is concerned, administration of his records are concerned. I do not deal with his training per se. I do not supply him. I don't deal with his logistics, as such. Now, this encompasses all of his personnel records, when he comes into the service and while he is at Fort Dix, all the rules and regulations pertaining to how they are kept, and so forth, safety on the Post, which is quite extensive. That would come under me. Civilian personnel and all its problems would come under me. The running of the Officers' Clubs, the Non-Commissioned Officers' Clubs, the PX facilities, service clubs, sports, all kinds of recreation come under me.

The Army Community Services would come under me. Legal Services that we provide for military and their dependents, if they have problems, financially, of if they need any kind of assistance of a humanitarian nature. I also have a baby-sitting service, and I think that generally covers most of them.

Q You are what is called a Staff Officer?

A I am a Staff Officer, that is correct.

Q You are a Staff Officer reporting directly to the General?

A That is correct.

MR. HILL: Do you wish any explanation as to what a Staff Officer is?

[53] THE COURT: No.

MR. HILL: No further questions.

THE COURT: Gentlemen, I am going to take a short recess, and I have another sentence.

(RECESS)

[54] MR. KAIRYS: Are you ready, your Honor?
THE COURT: Yes, sir.
MR. KAIRYS: Call Colonel Olsen, please.

VINCENT I. OLSEN, called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. KAIRYS:

Q Colonel, you are also a representative of Bert David, the commanding officer of the base?
A Yes, I am.
Q And what's your position?
A I am the provost marshal.
Q Provost marshal?
A (Nods head affirmatively.)
Q What does that encompass? What duties does that encompass?
A Provost marshal is responsible for the maintenance of law and order of Fort Dix.
Q Now, I understand you came prepared to respond to Item No. 1 on the subpoena which was—I'll read it to you:

"Access of civilians to the Fort Dix reservation and the facilities on the reservation."

What is the access of civilians to the reservation?
[55] A Well, civilians are authorized on the post. There is those that are employed on the post, those that pass through the post. There is also civilians that visit soldiers on the post.
Q So you can—putting aside employees who, of course, are entitled to access, you can pass through for no reason at all?
A Yes, you can pass through for no reason at all.
Q And you are not stopped?
A It depends on your conduct while you are passing through.

Q Well, let's go through the routine case first, if there is nothing unusual.
A Routine case, pass through.
Q You are not stopped. No matter how you are dressed? If you are in your car, you are running through?
A Well, there are certain proprieties of dress. I wouldn't want to see someone go through naked, assuming a person has clothing on.
Q I said how you are dressed, not whether you are dressed. Okay. You can visit someone there; isn't that correct?
A Yes, you can visit.
Q Okay. Can you come on to discuss business? Suppose you are interested in starting a concession on [56] the base? Is that okay?
A Yes.
Q Suppose you want to come in and see the fort, you are a tourist?
A Yes.
Q That's okay?
A Yes.
Q You can come in and you can ride all around?
A Yes, except certain areas.
Q Which are those areas?
A Those areas that are restricted.
Q And they are marked how?
A Normally with a fence. There may be a guard there or a barrier across the street, but there are signs.
Q Some of them have just a sign; do they not?
A Yes.
Q There's no barrier. But there is a sign saying it's restricted?
A Yes. At times there would be, yes.
Q How many open entrances and exits are there at Fort Dix?
MR. HILL: I object to the use of the word "open," your Honor, because I think, as I have expressed before, that's in conclusion. It's the ultimate conclusion of this case.

[57] THE COURT: All right. Would you accept this: Which are not either guarded by a sentry or which are barred by a barrier? Would you take that?

MR. KAIRYS: All right. Sure, your Honor.

THE COURT: How many?

THE WITNESS: I would approximate approximately ten that are roads, actually paved roads. Now, there are trails. You can walk on Fort Dix on foot, but this is just for vehicle passage. Approximately ten.

Q You can come on on foot?

A Yes, sure.

Q How many of these ten are New Jersey highways?

A New Jersey highways, I really don't know. I would estimate that we have one that belongs to the State of New Jersey.

Q Is that the Wrightstown-Pemberton Road?

A No, I believe that would be Route 68.

Q Route 68. That's a thoroughfare through the State of New Jersey; is it not?

A I believe so.

Q Are there buses that go onto the base?

A Yes.

Q What kind of buses?

[58] A Oh, I believe they are Public Service buses.

Q And they stop on the base?

A Yes.

Q And there is no control who gets on them and who gets off them?

A There is a control on who gets on and who gets off.

Q There is?

A Yes. On our end, at Fort Dix end.

Q Now, there is a bus, as I understand, that comes from the Port Authority in New York?

A I believe so.

Q And you are saying your end people would be questioned as they got off the bus?

A Yes. Especially soldiers out of uniform.

Q Well, I'm talking about everyone.

A No, everyone, no.

Q No. The usual thing is you get off the bus and you go where you please?

A Yes.

Q Okay. Civilians or military?

A Civilian or military.

Q Okay. Are there any other buses besides the Port Authority?

A Oh, I believe there are. But I really don't know.

[59] Q And they are public buses that are accessible to anyone of the public?

A That is correct.

Q Now, let's get to the case of—that you started to bring up before, when someone might be prohibited from the base. When is that?

A Well, if a person has intent to violate any of the existing regulations on Fort Dix, they would be prohibited from coming on Fort Dix to carry out that intent.

Q Well, now, how do you gauge that intent? You don't question everybody; right?

A That is correct.

Q You don't stop everybody?

A That is correct.

Q How do you decide who to stop?

A Well, normally, we have advanced information on individuals coming on the post that would cause this dissent or violate our regulations. This is some of them.

Q Is dissent an illegal purpose on the base?

A Is what, sir?

Q You said might cause dissent.

A No, that would violate our regulations.

Q It violates your regulations to dissent on the base?

MR. HILL: Your Honor, he didn't say that.

[60] THE COURT: Yes, he didn't say that. Strike it.

Q Is that one of the circumstances that gets you thrown off the base, if you dissent or if you are a dissenter, in your own words?

A No, because there must be an overt act. I could be a dissenter entering the base. You as the provost

marshal would not know about it, so, therefore, you couldn't me.

Q You must express your dissent?

A (Nods head affirmatively.)

Q And as soon as you express it, then your presence becomes illegal?

A It depends on the circumstances. These have to be taken case by case.

Q Well, what if you have a button that says, big button right on your chest that says "Support the Socialist Workers Party, Linda Jenness for President"?

A I see nothing wrong with that.

Q That's okay?

A I think the button is.

Q What if you want to hand out leaflets that say the same thing?

A Then I believe you're wrong. We have a—

Q Why?

[61] A We have a procedure to go through such as requesting permission from the Adjutant General to distribute literature.

Q And what if he examines the content of the literature—is that correct?

A That is correct.

Q (Continuing.) —to see if he approves of it and then he decides whether or not it's going to be distributed or not?

A I believe so.

Q What if you rode through in your car and had a banner across the back window that said "Support the Socialist Workers Party, Linda Jenness for President"?

A Nothing wrong with that.

Q Then it's the fact of handing out a leaflet—

A I'm assuming that the banner in the back of the car is not approved either. I don't think it's approved, but we have to see if it's one banner because I've seen a few with different political slogans on, and they are authorized on the base.

Q How about a picket sign, just a stick?

A A sign, no.

Q Just a stick with a sign on it?

A No.

Q No?

[62] A No.

Q How about the picket sign that says "America, Love It or Leave It"?

MR. HILL: Your Honor, I think we are getting much too far afield in this particular situation.

THE COURT: I think you can get to it a little quicker. It's not so much a slogan on a car as it is a person handing out something or actually, if you can put it this way, demonstrating with a sign.

Is that the difference, Colonel?

THE WITNESS: Yes, sir.

MR. HILL: Your Honor, that's what the basis of the Complaint is.

THE COURT: I know.

Q How about talking with people? How about a person who is talking to a group of three servicemen in front of the PX, and he's giving his opinion that the war in Vietnam is bad and that they should have nothing to do with the military?

A Who is this person you are describing? Are you describing another soldier or—

Q No. He's obviously a civilian. He's dressed under circumstances that would indicate he's obviously a civilian. Suppose he has jeans on and a T-shirt.

[63] A Well, his manner of dress has nothing to do with it. If you are inferring—

Q Okay. Suppose he has a coat and tie on.

A I think in that case we would question him as to his intent.

Q Why?

A Because of violating the post regulation which is coming on the post to distribute pamphlets.

Q Okay. I said all he's doing is speaking. He's speaking to three servicemen in front of the PX.

A Just as we are talking now?

Q Right.

A I don't think that would be noticed.

Q Well, I'm assuming it is noticed. Suppose it's brought to your attention.

A And the three soldiers object?

Q Maybe one of them does and two of them don't.

A Then we'd have to look into it.

Q You would inquire into that situation?

A Yes, definitely.

Q And what if you inquired in and found out that he was just speaking to them about the war, and that he felt very strongly that the war is wrong—

A Uh-huh.

Q —and that two of the soldiers agreed with [64] him and one did not as to general population or the post—

MR. HILL: Your Honor, aren't we getting extremely far afield from what this case is all about?

THE COURT: I think so.

Q Would you eject him from the base?

A I don't know. That situation has never happened. I really don't know. In that case I don't think I would personally.

THE COURT: Suppose he's drawing a crowd, Colonel?

THE WITNESS: Yes, sir, then I would.

Q Question No. 2, then, Colonel: "The flow of non-military traffic onto, off of and through the reservation including if no actual counts or estimates of numbers of vehicles and persons."

A The actual count or estimates I do not know. The only thing I can refer to is a traffic survey that was taken in 1970 which indicated that 66,000 vehicles came on the post.

Q Per day?

A I believe it was 66 per day. This was in and out.

Q In and out?

A Yes.

Q Question 6: "Whether civilians were stopped [65] and questioned upon entry"—we've gone through that. Never mind 6.

You referred to some parts that are restricted.

A Yes.

Q Is there a lot of the base that isn't so restricted, either by signs or fences or whatever?

A Well, not by signs or fences. We have three areas that I know are restricted as far as signs and fences.

Q Do you know what area, surfaced area they composed—

A No, I do not.

Q In relation to the base? Is it very large in relation to the entire base?

A No, it isn't.

Q Okay.

A Now, this is—let me—

Q Go on.

A Can I expound on this a little further?

Q Sure. Sure.

A This is restricted in the sense that no one except authorized personnel on the access list that are allowed in here. These are ammunition depots.

Q I see.

A Now, in the billet I believe areas, they are restricted in a sense because they have roving patrols and guards.

[66] Q What's the billet area?

A Where the soldiers live.

Q The barracks?

A The barracks. They have roving guards and you are restricted. A civilian cannot walk in there and walk into the billet. He would be stopped and challenged.

Q The roads in front of the billets are not restricted?

A No, they are free flow.

Q Right. You are just questioned when you come in the barracks?

A Yes.

Q How about the roads around the stockade?

A You can pass up and down the one road, but the road going around the stockade, the present stockade is a restricted area.

Q The road that goes into it?

A That's correct.

Q Okay.

Item 10: "The number of persons ejected and barred from the reservation within the last two years and the reasons."

A I have those figures. In 1956, according to the present roads that we have, there was 56 persons barred, issued letters of ejection by the provost marshal division. [67] This is the military police.

Q 1956?

A No. That's 1971 there were 56 total.

Q Now, wait a minute. Are those bar notices that were issued during 1971 or is that the total number of people who were barred at this time?

A No. This was issued from 1 January 71 to 31 December 71.

Q Okay.

A 56.

Q Go on. I'm sorry.

A And from 1 January 72 to the present date, unless somebody was restricted last night, that figure is 99.

Q And do you have a breakdown on the reasons?

A Yes.

Q Could you give that, please?

A Disorderly conduct, trespassing, illegal solicitation, unauthorized publications, larceny, violation of Title 18, possession of marijuana, assault, possession of stolen goods, carrying a concealed weapon, traffic offenses, possession of narcotics, contributing to the delinquency of a minor, failure to give a good account. That is for 1971.

I believe the list for '72 would be practically the same with maybe one or two differences.

[68] Q Do you have proportions in those various categories or is that just a list?

A I have actual figures.

Q All right. Can you go down them again, please? I don't want all of them. I guess the one I'm most interested in is unauthorized literature.

MR. HILL: Your Honor, I think if we are going to give one, give them all.

Q Give them all. He's trying to save a little time.

A This is 1971 now?

Q Right.

A Unauthorized publications: 7. 1972, 56.

Q 56 out of 99 then in 1972 so far?

A That is correct.

Q What is solicitation?

A Prostitution.

Q Okay. Perhaps you should run down those figures—

MR. KAIRYS:—your Honor, because I'm not sure.

THE COURT: Would you do it?

THE WITNESS: Yes.

Q Which of the others are related to First Amendment activities?

[69] A Disorderly conduct: 11. Trespassing: 9. Illegal solicitation: 12. Unauthorized publications: 7. Larceny: 3. Violation of Title 18: 4—

Q Excuse me. Title 18 is being present there—

A That is a broad category. Since I wasn't there in 1971, I don't know what they are for.

Q Okay.

A But there is only four.

Q How many is that in 1972?

A Two.

Q Okay.

A Possession of marijuana: 1. Assault: 1. Possession of stolen property: 2. Carrying a concealed weapon: 1. Traffic offenses: 1. On possession of narcotics: 1. Contributing to the delinquency of a minor: 1. Failure to give a good account: 2. That's a total of 56 for 1971.

You want 1972?

Q No. Unless—

MR. KAIRYS: Would you like it?

MR. HILL: Can you read down them quickly, Colonel?

THE WITNESS: Yes, I can.

Possession of marijuana: 6. Robbery: 7. Unauthorized publications: 56. Failure to give a good account: 4. Illegal solicitation: 4. [70] Larceny: 2. Violation of Title 18 U.S. Code: 2. Impersonating a female: 2. Disorderly conduct: 22. Trespassing: 4. Possession of narcotics: 1. Unauthorized use of ID card: 1. Carrying a concealed

weapon: 1. Possession of a dangerous weapon: 1. Fraud: 1. Vandalism: 1. Indecent sex acts with a minor: 1. Violations of provisions of a previous letter of rejection: 1.

And that totals 99 for 1972.

Q Okay. Is a civilian allowed to come on and set literature that he wishes to distribute next to, say, where the New York Times is sold? I'll give you a more concrete example.

Assume someone wanted to distribute copies of the Militant, which is a newspaper that is very much opposed to the war in Vietnam. Can they set down their piles of the Militant next to the piles of the New York Times for sale?

A No, because there is a certain procedure you have to go through in order to get the Militant in alongside of the New York Times or any other recognized newspaper.

Q And does that involve approval as to the content of the publication?

A That I could not say. I know that there is a procedure you must go through the Adjutant General.

[71] Q Do you know the procedure? Do you have to submit copies?

A No. I think it's just a written request. That's providing the Militant is a recognized newspaper.

Q Recognized by whom?

A Well, isn't there an association of the press, United Press or all of them together that newspaper publishers, et cetera?

A I see.

Q Would an underground newspaper qualify?

A That's what I'm trying—

Q And underground newspaper would not qualify?

A I think in that case they may ask you to submit a copy of it.

Q I see. But if it's not on this approved list, then you have to submit copies, and the content would be observed?

A That I cannot say. I do not judge that.

Q But they do ask for copies then?

A No. I can't say that either. This is my own personal opinion.

Q I'm saying: If they are not on this approved association list, then they ask for a copy, like an underground newspaper?

A I would think so. In fact, I would hope so.

[72] Q Why would you hope so?

A Because if it's wrong, then I have to enforce it.

Q If what's wrong.

A If the paper is wrong. If it's a paper that is wrong.

Q What makes a paper wrong?

A I don't know. I would say papers—

MR. HILL: Your Honor—

THE COURT: He's told us that's not his job.

MR. KAIRYS: Nothing further, your Honor.

THE COURT: Mr. Hill.

CROSS-EXAMINATION
BY MR. HILL:

Q Colonel, you are the provost marshal; correct?

A That is correct.

Q In that capacity, you are responsible for the security of Fort Dix?

A Yes.

Q How long have you been at Fort Dix, sir?

A Fourteen months.

Q I think your testimony is that as a general matter, there are no sentries at the entrances to Fort Dix; is that correct.

A Yes, that is correct.

[73] Q Isn't that true because of the rural location of Fort Dix and the general inaccessibility of—

MR. KAIRYS: I object.

THE COURT: What ground?

MR. KAIRYS: It's a leading question, your Honor.

MR. HILL: It's cross-examination.

MR. KAIRYS: Of his own witness. He's a representative of the defendant.

THE COURT: We are going to get to it anyway. If he hasn't already given the answer.

A There is a lot of reasons. Fort Dix is remote. It's in a rural area. The number of military police that we are to police the post, the cost of erecting a shelter for the military police. There is a lot of reasons. And with the phase-down of the Army, the money is not present or are the personnel present to police such a large post.

Q Is part of the land posted with No Trespassing signs?

A Yes. The back portion bordering Route 70 is posted "No Trespassing, U.S. Government Property" and in those areas where we do not have a fence.

Q Now, isn't it true that the military police patrol the post on a continuous basis?

[74] A Yes. We patrol the post 24 hours a day.

Q Would you tell me how many patrols you normally have operating at a given time?

A Yes. It varies from five to eight each eight-hour shift, and then payday and the week after payday we increase our patrolling effort.

Q And how many men are on each patrol?

A Two men on the patrol.

Q Now, isn't it—as a general principle, would any civilian on the post behaving suspiciously be stopped?

A Yes. Any civilian or military acting suspiciously.

Q Does Fort Dix have traffic regulations?

A Yes, we do.

Q And has Fort Dix promulgated or adopted the traffic regulations for the post?

A Yes, they have.

Q Even though they apply to some county and some State roads?

A Yes. We have exclusive jurisdiction on traffic.

Q Right. And traffic offenders would be stopped; isn't that correct?

A That is correct.

Q And they will be issued summonses; isn't that correct?

[75] A If they are civilians, they would be issued summonses to the magistrate court.

Q That's to a federal magistrate; isn't that it?

A Yes.

Q And it's true that the United States has exclusive jurisdiction over Fort Dix?

A That is correct.

Q Even over the county roads and the State roads that do travel through the fort?

A That is correct.

Q Now, isn't it true that during the course of the last year, and on perhaps 10 to 12 occasions, you have set up roadblocks at various points on the post including the county roads and stopped vehicles, civilian vehicles?

A Yes, we have.

MR. KAIRYS: Your Honor, we can have Mr. Hill testify if he'd like, but I would object to the leading question. That was a paragraph.

THE COURT: He said, yes, they put up roadblocks. Next question.

Try not to lead too much.

MR. HILL: Yes.

BY MR. HILL:

Q Would you please describe the reasons and [76] the circumstances under which the military sets up these blocks?

A Yes. Primarily, or most of the time we set it up to check on decals, to see if the vehicle is registered on the post. Occasionally, when we have advance notification of demonstrations, we will set up roadblocks to keep the demonstrators off the post because they try to penetrate the post.

Q What about on a daily basis? Is there any effort to check civilian vehicles to determine whether or not they have decals to be on the post?

A Yes. This is done continuous, day and night.

Q And civilian vehicles are in fact stopped?

A Yes, definitely.

Q Now, with respect to concessionaires, if you noticed a peddlar going door to door, would you stop him at all?

A Yes. We would stop him and give him a letter of rejection. If he didn't have the proper authorization.

Q In other words, if peddlars or concessionaires have proper authorization, they are permitted to stay on the base?

A Yes.

Q But if they don't have the authorization of a franchise, they are not permitted?

[77] A That is correct.

THE COURT: Do you recall any times when door to door solicitors have been allowed on the base?

THE WITNESS: Yes, sir. Occasionally they will—well, these aren't solicitors. They are children that are hired by the women's club to distribute pamphlets for the things pertaining to the base.

THE COURT: Social functions?

THE WITNESS: Social functions, yes.

Q But if we're dealing with strictly solicitors, are they permitted on the base without express authorization?

A No, they are not.

Q And is this enforced?

A Yes, it is.

Q Now, there are buses coming onto Fort Dix; is that correct?

A That is correct.

Q To your knowledge, are these buses franchised by Fort Dix?

A I believe they are.

Q Now, in response to question by the plaintiff's counsel, you indicated that in a traffic count, which was done when?

[78] A That was 1970.

Q —that some 66,000 vehicles went in and out of the post on a given day.

A That is correct.

Q So we're not talking about just vehicles entering the post; are we? We are also talking about the vehicles that leave. So we have some sort of a double count there.

A Yes. And one vehicle could come in and out maybe five or ten times.

Q And over how long a period was this traffic study conducted which totalled 66,000 vehicles in and out?

A I really don't know because I didn't take that much time to look to see just what period of time, but I know the count was taken over a period of a week because on any given day this was the figure.

[79] Q Was that for a 20-hour day?

A Yes, 24 hours.

Q If I'm not mistaken, wasn't the count taken at all gates of the post or just one gate? Was it for all gates?

A It was taken for all gates at the same time.

Q Directing your attention to August 17, 1972 when plaintiff John Ginaven and Donald Misch were given letters of rejection, to your knowledge did either of these individuals submit to the Adjutant General of the post in advance of distribution the materials they were distributing?

A No, they did not.

Q With respect to the plaintiff Alan Hardy I direct your attention to February 1972.

MR. KAIRYS: We will stipulate that none of them did, that is with the exception of a letter with regard to the four Presidential candidates.

MR. HILL: Yes. We're just talking about the pamphlets here.

THE COURT: All right.

Q There is a regulation on Fort Dix, is there not, requiring people who wish to distribute literature to apply to the Adjutant General of the post for permission?

[80] A That is correct.

Q I direct your attention to the evening hours at Fort Dix and ask you to tell me the nature of any patrol in the billet area, and in the processing areas.

A Yes. During the evening hours we have the normal five or eight shifts come on and then about 9:00 o'clock as far as Military Police we would put on additional shifts. I have additional three to five shifts come on, so that gives me anywhere from 10 to 11 patrol vehicles.

In addition, each of the units have their own patrols within their barracks area. They patrol their area, and then the post is broken down into five quadrants, and

each unit that has a quadrant will have a patrol in that area, so there are lots of patrols at Fort Dix at night.

Q Is it fair to say that the local policing includes county roads, patrolling them regularly 24 hours a day, seven days a week by the Military Police?

A I would say that the Military Police, and then we have these under guard that would come out on some of the highways, too.

THE COURT: By "unit" you mean either company or battalion?

THE WITNESS: The Fifth Brigade may have their own patrol. That would encompass a State highway [81] and back in.

Q These are Military Police patrols and internal guards of various companies that assert control over the entire post?

A That's right.

THE COURT: The correct term is interior guard.

MR. HILL: Thank you, your Honor.

Q Colonel, if Fort Dix were located in the heart of Philadelphia or any built-up area, would sentries be placed at the gates?

THE COURT: Objection sustained.

MR. KAIRYS: I don't think he's an expert on security.

THE COURT: Have you been to Fort Sam Houston? Have you been stationed there?

THE WITNESS: I have been to the presidio in San Francisco, the heart of San Francisco. They did have guards, and then the times were different. They are not the times of today. This was five years ago. They do have guards at the gate.

MR. HILL: I would also point out to the Court that Sam Houston is a different—

MR. KAIRYS: Are you testifying?

[82] THE COURT: Objection sustained. Next question.

Q Can you tell me how many civilian pedestrians there are, whether there are many civilian pedestrians walking through the post?

A I would say there are a few. I would go that far and say they do walk through the post, civilian pedestrians.

Q A large group?

A Not a large group, just a few.

Q I want you to tell the Court whether or not there are sidewalks that go from one end of the post to the other.

A No, there are not.

Q Were you present when Dr. Spock, Julius Hobson and the other candidates who ran for political office came to the post on September 23?

A Yes, I was present.

Q Could you tell me approximately how many people were with Dr. Spock?

MR. KAIRYS: I object unless you provide a basis for his knowing.

MR. HILL: Who was in the party and—

THE COURT: He can explain it.

A Initially I saw Dr. Spock coming down. I think [83] there were three people with him. There were three or four Secret Service men with him, I think at the particular time, but prior to him arriving a group of about 60 yere waiting for Dr. Spock, and they just crowded around Dr. Spock, as I think—in fact, you were there (indicating).

When we met at the entrance to the post there were about 50 or 60 onlookers or other people that were there, not with Dr. Spock, but at the same time as Dr. Spock.

Q Were they civilians?

A Yes. From all that I could determine they were civilians.

Q Were there any banners carried that were around Dr. Spock?

A They had a banner.

Q Supporting Dr. Spock's candidacy?

A I really don't know what it said. It said something about Dr. Spock. It was a large banner. It was about eight feet long and four feet high with writing on it.

MR. HILL: No further questions.

REDIRECT EXAMINATION
BY MR. KAIRYS:

Q You said some people are allowed to go around to the barracks and distribute pamphlets if they are approved, is that right?
[84] A Not to the barracks.
Q Where?
A I'm sorry if I said that, but to the housing area.
Q The housing area?
A Yes.
Q And there you said was usually children?
A Yes. Teenagers, young kids, twelve or thirteen years old.
Q Pamphlets about what?
A Officers' wives clubs having a tea or the daily bulletin is distributed once weekly.
Q What is the daily bulletin?
A That is a bulletin that is published by the headquarters daily informing personnel of changes in regulations, different functions.
Q Do they distribute these things around the PX, cafeteria?
A This is done in the housing area.
Q Just the housing area?
A Just the housing area.
Q Just so we will have it straight, the number 66,000 is the number of civilian vehicles coming in and out?
A The number of vehicles. They could be military or they could be civilian. They could be commercial vehicles.
Q Do you have a breakdown as to—
[85] A No, I do not. I'm sorry.
Q You don't have the answer to that question as to the really nonmilitary vehicles?
A That is correct.
Q In other words, it's no more than 66,000 because that is the total, but you don't know in between there which is which?
A That is correct.
Q That is because you don't keep track of who comes on or leaves?

A No. That is not the reason why we don't do it, because it serves no general purpose to determine how many vehicles are coming on and off the post unless we have a reason.
Q The reason you don't know the breakdown is because you don't keep track?
A The reason I don't know the breakdown is the survey was taken in 1970 and I have a piece of paper that says it, but they didn't break it down.
Q All right.
You explained the law enforcement activities, the patrols that are out. It is very much like the patrols or police situation in any community, isn't it?
A I would say yes. We follow certain procedures.
Q And they are there to patrol as to military [86] personnel and civilians whoever is on the base?
A That is true.
MR. KAIRYS: I have nothing further.
MR. HILL: Nothing further.
THE COURT: We will break until 2:00 o'clock.

(Luncheon recess.)

[87] AFTERNOON SESSION

MR. KAIRYS: We will call Dinah H. Portnoy.

DINAH H. PORTNOY, affirmed.

DIRECT EXAMINATION
BY MR. KAIRYS:

Q What is your address?
A 3605 Hamilton Street, Philadelphia.
Q Where do you work?
A At Philadelphia Resistance in Philadelphia.
Q What kind of work do you do at Philadelphia Resistance?
A Philadelphia Resistance is an antiwar group, and we all work on different projects. Between August 1970 and August '71 I worked at the military legal center in

Wrightstown, New Jersey as a military counselor in antiwar work.

Q You say as military counselor, what does this mean?

A Mostly people would come in to the office who had certain kinds of legal problems in the Army, for example they wanted to know how to get a discharge. They wanted to know what certain rights were, or they needed civilian legal counsel for a court martial, and we provided them with all that information.

[88] Q There was a lawyer on duty then?

A Right.

Q In the course of that work did you have occasion to go onto Fort Dix Army Base?

A All the time. During that year I went to Fort Dix sometimes as often as three times a week and sometimes just once. That was every week during that entire year, in order to get to Wrightstown I drove on Route 68 to the base. For a while I had a friend who lived in Browns Mills, and in order to get there I would drive on Texas Avenue that goes right through the base between Wrightstown and Browns Mills.

Q You would use Texas Avenue and Route 68 as a thoroughfare?

A Right. I also had to go on the base for other kinds of things.

MR. HILL: I don't think there is any question pending.

THE COURT: Next question.

Q What building or facilities did you visit while on the base?

A Several times I went to different barracks, either to pick up somebody who needed a ride to get to the military legal center or to go to see somebody who couldn't get out of their barracks, and there was usually a sign [89] over the door saying "Visitors go to orderly room." And you could go to the orderly room and ask to see anybody.

Q Were you ever excluded from the barracks?

A No. I also went to several court martials in those buildings and to the PX cafeteria when I was like on the

base all day at a court martial, and a couple of times to visit a judge advocate general officer.

Q And did you and other people on the project use other facilities such as the theater?

MR. HILL: Excuse me. This question is highly leading. He may ask what facilities she used.

Q What other facilities did you and other people on the project—civilians, I'm talking about, not military—use?

A Most of us visited the places mentioned. One person I know who worked there longer than I did had been to the movie theater several times.

MR. HILL: Is she testifying to this from other than her own knowledge?

THE COURT: What difference does it make? Next question.

MR. KAIRYS: I have nothing else.

MR. HILL: We have no questions.

THE COURT: Call your next witness.

[90] ROBERT STANTON, affirmed.

DIRECT EXAMINATION
BY MR. KAIRYS:

Q Mr Stanton, where do you work?

A I am a radiation physicist at the University of Pennsylvania.

Q On December 5, 1968 did you enter the Fort Dix Army Base?

A Yes.

Q What happened?

A I went to one of the barracks areas. I entered one of the barracks with leaflets, and when I began to pass them out I was stopped by a sergeant and told to go to the orderly room. From there some Military Police people came and took me to another building where I was questioned, and after a few hours was issued a notice of rejection.

Q Did anyone stop you from entering the barracks before you handed out the leaflets?

A No.

Q What was the content of the leaflets? What did it say?

A They were Student Mobilization Committee leaflets. As I remember, they were about an educational teach-in occurring at the University of Pennsylvania to which we hoped to invite people from the base.

Q If this Court granted the injunction that [91] you have applied for as one of the plaintiffs in this case, what is your intent with regard to the Fort Dix military base? What would you do?

MR. HILL: I don't think plaintiff's intent has anything to do with this case.

THE COURT: Go ahead.

THE WITNESS: Shall I answer?

THE COURT: Yes.

A Well, there are several things. Right now there are two demonstrations being organized in Philadelphia by the Student Mobilization Committee and the Peace Action Committee. One is taking place October 26, the other November 18. Also coming up is the election November 7.

What I would like to do is go back onto the base with leaflets about the war, educating on the character of the war, telling people what activities they can get involved in to help end the war sooner. I would also like to speak to people about the antiwar issue with regard to the elections, because I think that is a very important issue people should consider when they are deciding how they are going to vote.

Q Pursuant to that intent will you comply with reasonable regulations made by the Army base as to time and place that you could do these activities?

A Yes, I would.

[92] Q And if they make a regulation you felt was unreasonable, what would you do?

A Bring it back to court. I think an unreasonable regulation should be decided as to its illegality.

MR. KAIRYS: Nothing further.

MR. HILL: Three brief questions.

CROSS-EXAMINATION
BY MR. HILL:

Q Have you been back and forth to Dix since 1968?

A I have not been on the grounds of the base.

Q Have you been on the roads to go through it?

A No, I have avoided it.

Q It was 1968 that you were ejected, is that correct?

A Yes.

Q You brought no other court action against the military since 1968?

A I have not.

Q In 1968 did you ask permission of the Adjutant General to distribute leaflets you were distributing? Would you answer my question?

A No.

MR. KAIRYS: May he complete his answer?

THE COURT: You may interrogate him on [93] redirect.

Q I understood you would like to distribute leaflets later this month?

A Yes.

Q Have you submitted those leaflets to the Adjutant General and requested permission to distribute those?

A The answer is the same as to the other. No, we have not. I don't think we have to.

THE COURT: Anything further?

MR. KAIRYS: No, I have nothing further.

JOHN H. GINAVEN, affirmed.

DIRECT EXAMINATION
BY MR. KAIRYS:

Q Mr. Ginaven, where do you work?

A With the Central Committee for Conscientious Objectors in Philadelphia.

Q And what kind of work do you do?

A Basically I'm involved in draft and military counseling, helping young men and women by providing information about the alternatives under the draft, and also under the Uniform Code of Military Justice.

Q Did you go onto Fort Dix Reservation on August 16, 1966?

A Yes, I did.

[94] What happened?

A I went on in the afternoon to leave leaflets with some GI booklets that the CCCO has published recently. Actually one of the booklets was one we were leaving. We had the other available—six booklets in all. I passed these out to GI's that came in, came by, and made a concerted effort to stay on the sidewalk, on the road of the Wrightstown Road. We avoided interference with the vehicles on the road, and we avoided leafletting cars, in order to prevent, you know, blocking traffic or anything like that.

In other words, we tried to be peaceable. We leafletted about an hour and fifteen minutes and then the M.P.'s came up and asked what we were doing, took the leaflets and took us to the provost marshal. At that time they detained us in the questioning room for about three or three and a half hours while they checked into basically —into our question whether what we were doing was legal under the Flower decision.

We were aware of the Flower decision at the time. Finally they decided to bar us from the base and handed us the barring orders.

Q What was the content of this booklet, what was it about?

A Basically it's a brief summary of Army regulations [95] permitting discharge from the Armed Forces. It is written in layman's terms so that GI's can understand it, and it also provides a contact where they can get either further counseling or referrals to people who can help them in, you know, thinking through their decisions in regard to discharges.

Q If you were one of the plaintiffs in this case and were granted the right to exercise your First Amendment right on the base, what is it you intend to do?

A I would go back with other members of my organization would go back to provide these leaflets and also to talk to GI's about GI rights, and about the Vietnam war and war and peace issues in general.

Q Would you comply with any reasonable regulations about the time and place of such leaflet distribution and discussions?

A Yes. I think I would if it didn't interfere with my First Amendment rights.

Q If you thought it was unreasonable what would you do then?

A I would do the same thing I'm doing now, come to court.

MR. KAIRYS: Okay. Nothing further.

CROSS-EXAMINATION
BY MR. HILL:

[96] Q Mr. Ginaven, isn't it true that you did not submit to the Adjutant General at Fort Dix the leaflets you were trying on August 17, 1972 to distribute when you were barred from the post?

A That is correct.

Q And isn't it further true that you have not submitted to the Adjutant General at Fort Dix any of the leaflets you would distribute if the Court said you had First Amendment rights?

A That is correct.

MR. HILL: no further questions.

MR. KAIRYS: One further question.

REDIRECT EXAMINATION
BY MR. KAIRYS:

Q Why didn't you supply a copy for their authorization?

A Pardon?

Q Why didn't you supply a copy for their authorization?

A As I mentioned, we were aware of the Flower decision by the Supreme Court that essentially said that you are allowed to leaflet on a public access road to a military base, and you didn't need prior permission, and so we were going under the Supreme Court ruling, which we believed applied to all military bases.

[97] SIDNEY ROBERT STAPLETON, affirmed.

DIRECT EXAMINATION
BY MR. KAIRYS:

Q Where do you work?

A I am treasurer of the Socialist Workers Party campaign.

Q Did you enter Fort Dix Military Reservation yesterday?

A Yes, I did.

Q Would you tell us what happened to you?

A Well, basically I drove onto the fort from Highway 68, which comes in from the New Jersey Turnpike, and as I drove onto the base I noticed there was no particular demarcation or control of flow into the base. There were a couple of brick gate posts at the entrance, but with no gates attached.

I drove onto the base and there was an information booth right close to the entrance to the base, and I drove into the area. There was no one on duty at the booth, but there was a large map of the base indicating where the various facilities were at the base, so I went from there to the—I just drove around in the headquarters area, which was right around the information booth.

Then I went to the PX and cafeteria. When I arrived [98] at the PX and cafeteria I talked to a couple of GI's there and I asked them if it was possible for anyone to eat in the cafeteria where I could get a newspaper, and after having talked to them I got a newspaper and picked up a couple of copies of newspapers, both of which I have here.

MR. KAIRYS: May they be marked. There are two of them.

(Plaintiffs' Exhibits No. 8 and 9 marked in evidence.)

A There was the Evening Bulletin and the County Times. Both of those newspapers had material on campaigns in them. The Burlington County Times has an

editorial endorsement of Nixon and the Evening Bulletin has a front page picture of Shriver campaigning along with a front page box which describes their election campaign including a story on Nixon, a story on McGovern and a story on Agnew and a story on Shriver.

Q Can you tell us if you can identify Plaintiffs' Exhibit No. 7?

A Yes. That is the copy of the Evening Times that I picked up in the PX. After getting the newspapers I went to the cafeteria and ate lunch in the cafeteria. I noticed there were several people there that in my opinion could not have been Army personnel. That is, [99] they were young men with full beards and long hair who were eating in the cafeteria. There were probably five or six of them eating in the cafeteria in the area.

After eating in the cafeteria there, I went to the newsstand, which is associated with the cafeteria and I noticed that there was a very broad range of material in the newsstand that was analogous to a Greyhound bus depot type newsstand with a wide distribution of magagines including Newsweek, Time, National Lampoon, quite a wide distribution of newspapers from the New York Times to the National Enquirer.

There was also a fairly large selection of books that included something like Philip Roth's "Our Gang," which is a satire of President Nixon, and another one called "When the War Is Over," described as being a provoking novel on the horrors of military justice. There were several other, you know, vaguely political books, and then the usual range of Jacqueline Suzanne and so forth.

Q Did you see any newspapers, periodicals that endorsed any candidates in this election other than Democratic or Republican candidates?

A No. There were none of the underground publications or radical publications or anything like that. There was just nothing of that kind there. There were a [100] couple of magazines that would mainly relate to black GI's, a thing called Hep, which had something about Angela Davis on the front cover, but there was no radical

political material like the Daily World or anything of that kind.

Q Can you briefly list any other places you visited on the base?

A Just one thing, in the PX parking area I looked around for cars with Army identification stickers, and I would say that maybe a quarter of the cars in the PX area had no Army identification of any kind associated with them.

I went from the PX to drive around the base and just looked around and drove through the training and classroom areas where, incidentially, there was an ice cream truck going around through it and there was a group of 50 GI's milling around the ice cream truck.

I then went through some of the housing areas, drove past the stockade, saw some GI's doing drills and training along with—I guess it was a bayonet practice field with rubber tires mounted on steel frames with things coming out—I don't really know.

Then I found I got lost because it's a very complex roadway system in the base—at least it seemed so to me. I found myself going in and out of the base [101] without really having the intention of doing so. I wanted to just drive around in the base area, but I went out once in the Pemberton Road and once by an airfield, I think it was on Texas Road, where, as far as I could tell, there was no demarcation where you were on the base and where you were off.

Q Did you have a map of the base?

A No, I didn't have a map of the base until later when I got one. After I had driven around for a period of time and seen the advertisements for a rock concert and so on and a number of other things like visitors' parking facilities and visitors' information facilities, I then stopped at Route 68 or the Highway 68 entrance to the post and tried to keep count for 15 minutes of how many cars I could identify as being associated with the Army went in and out of the post during that period of time.

Q How did you make that determination, which ones were identified as Army?

A Obviously Army vehicles are vehicles that had stickers on the front or rear bumpers that were Army stickers, and I counted 53 in this space of 15 minutes that went in and out of the base on Highway 68.

Q 53 nonmilitary vehicles?

A Right. I don't know really whether or not they [102] could have been people visiting somebody on the base or not, although there were some that were obviously campers and seemed like people going through a vacation or some other businesses.

Q You mean the vehicles were?

A Right.

Q Did you find that most of the traffic was military or nonmilitary?

A No. Most of it was military.

Q Did you—go ahead. What was the rest of your trip?

A So then after that I went to the main information booth, which is right as you come in on Highway 68, and there was an M.P. on duty there, and I asked the M.P. if—I said I was a visitor in the area and just wanted to look around the base and was there any problem with that. And I also asked for a map of the base. And then I asked him if there were any problems with restricted areas on the base.

And upon the conclusion of that conversation, I felt quite sure that I was in no danger of violating regulations by visiting all areas of the base other than those specifically posted as restricted.

Q Okay. Do you have that map?

A Yes, I do.

[103] MR. KAIRYS: Can we mark that as Exhibit 10?

THE COURT: Any objection?

MR. HILL: I think that might be the small version of the map that we already submitted. No objection.

THE COURT: All right. Mark it.

THE CLERK: Marked P-10.

(Map received and marked as Exhibit P-19 in evidence.)

A At that point I left the base after having visited the information booth.

MR. KAIRYS: Thank you. Nothing further, your Honor.

THE COURT: Cross.

CROSS-EXAMINATION
BY MR. HILL:

Q Mr. Stapleton, did you read any of the newspapers at the PX newsstand to determine whether or not they contained any articles on Dr. Spock or any of the other plaintiffs in this case which are considered candidates for national political office?

A Well, I looked through a number of them and I'm familiar with the general editorial content of many of the papers.

Q I didn't say "general editorial content." [104] Did you determine whether there are any news articles on any of the candidates for national office that are plaintiffs in this election?

A No, I did not read every publication on the newsstand.

Q And you were looking primarily for editorial support?

A Well, no. I just looked at the publications. And some of them had front page material on the campaign. None of the material visual to me as I looked on the material on the shelves and flipped through the newspapers had any relation to Dr. Spock's Socialist Workers Party or anything at all out of the ordinary politically.

Q You don't know whether there were any articles about Dr. Spock; do you?

A No, I don't. No, I don't know that.

MR. HILL: No further questions, your Honor.

THE COURT: Anything else, Mr. Kairys?

MR. KAIRYS: Nothing.

THE COURT: Thank you, Mr. Stapleton.

THE WITNESS: Thank you.

(Witness excused.)

MR. KAIRYS: Fred Halstead, please.

[105] FRED W. HALSTEAD, called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. KAIRYS:

Q Mr. Halstead, you are here as a representative of the Socialist Workers Party?

A Yes.

Q You are a member of the national committee of that party?

A Yes.

Q And you were a candidate for President of the United States in 1968; isn't that right?

A Yes, in 1968.

Q Are you running for office right now in this coming election?

A Yes. I'm a candidate for United States Senator from Illinois on the Socialist Workers ticket.

Q All right. Why does the Socialist Workers Party want a campaign at Fort Dix?

A Because we want to reach constituents who are GI's. We want GI's to have a right to vote. They certainly have a right to consider the issues. We think we have a position on issues of particular importance to GI's, particularly on the war. I don't know anybody else who has a better right to have an opinion on the war, to [106] express that opinion and make an intelligent decision on it based on hearing all points of view. And we think that's very important.

Q Do you have the means to reach them any other way?

A It's very difficult. We don't get much radio and TV time. We don't have the money for it. We very rarely are reported in the major press. There are ar-

ticles every week in the Militant and articles occasionally in the underground press.

Our main way of reaching people in our campaigns is distributing leaflets, speaking to them personally, organizing meetings to which we invite them, going to the places where they are and speaking to them, like at campuses, in front of plant gates, passing out leaflets there.

Q Have you been on the base yourself?

A Yes.

Q When was that?

A In 1968 a friend of mine, and a member of the Socialist Workers Party, who is a supporter of my campaign, was being court martialed for allegedly putting up a political sticker somewhere on the base. And I went to attend that court martial. That's why I was there.

Q And what happened on that day?

[107] A Well, I attended the trial. During the course of the trial there was a recess. And I left the courtroom, as did other people in the courtroom, during the recess, and went across the street to a PX to get refreshment. I had a soft drink there, stood around in the PX and outside of it until the recess was over and went back to the trial.

The trial was very shortly after that over, fortunately, my friend was acquitted.

And then I went back across the street to the PX, in front of it, and I had on my possession a dozen or so campaign brochures which I thought I might just as well pass out on the scene. I started to distribute them to the GI's there in front of the PX. I got about two of them distributed when the M.P.'s took me by each arm and escorted me to the provost marshal's office—I didn't resist. They took me that way—where I was given a letter informing me that I—if I came back on the base, I might be subject to arrest. And then I was escorted off the base.

Q Were you approached by any M.P.'s or any authorities at all up until the time you handed out these papers?

A No.

Q Okay. If this Court should grant the [108] injunction that we've requested here today, what is the intent of the Socialist Workers Party with regard to the Fort Dix military base?

A I would like to go there to speak about our campaign to GI's and distribute our campaign literature, particularly before the election. We're on the ballot, as is the Peoples Party, in New Jersey. We were on the ballot in New Jersey in 1968 also, and there are a lot of young people in uniform at Fort Dix that we'd like to talk to about our campaign before the election.

Q Will you comply with reasonable regulations as to the time and the place of such address and such leafleting?

A Certainly.

Q And if regulations are made that you consider unreasonable, what would you do.

A Test it in court.

Q Now, have you spoken before many engagements on behalf of the Socialist Workers Party both in the course of your candidacy and after?

A Yes, hundreds of them.

Q Hundreds of them. How big have the audiences been?

A Well, they can vary from a half a dozen to 30,000. I've spoken before—

[109] Q Have they included military personnel at times?

A Yes, quite often.

Q And have you had any trouble—have any of your speaking engagements or those of the Socialist Workers Party resulted in riots?

A None. None whatever. I have never, when I was speaking as a candidate, ever had any physical disturbance at all occur at the meetings that I spoke before as a candidate. Nothing more than questions and normal heckling. Nothing physical.

MR. KAIRYS: Nothing further, your Honor.

THE COURT: I'm curious, Mr. Halstead. How would a political address at Fort Dix by you enhance your candidacy in Illinois?

THE WITNESS: I don't think I would be the one.

THE COURT: It's not going to control this case, but I'm curious.

THE WITNESS: I don't think I'd be the one speaking before Fort Dix. I'm only here because I was the Presidential candidate in 1968, and at this time—

THE COURT: I understood you to say that you might go back to hand out leaflets if [110] authorized by the Court.

THE WITNESS: Not me personally. Other members of the Party for other candidates.

MR. KAIRYS: He was speaking on behalf of the Socialist Workers Party.

THE COURT: I see.

MR. HILL: No questions, your Honor.

THE COURT: Thank you, Mr. Halstead.

(Witness excused.)

MR. KAIRYS: The last witness, your Honor. Donald Campbell.

DONALD ALBERT CAMPBELL, called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. KAIRYS:

Q What is your rank?
A E-1.
Q E-1. Where are you stationed?
A Fort Dix.
Q Were you drafted or did you volunteer?
A I was drafted.
Q How long have you been at Fort Dix?
A Well, since the 31st of August.

Q What kind of leisure time could you and the [111] other men who are there training with you have during the training period?

A Well, during the eight and a half weeks basic, as you progress further into those eight and a half weeks, you get more and more leisure time. I myself, during the time I've been there—I'm not a very fast reader. I've read through about four and a half readable size books right now. Usually between the hours of 6:00 and 8:00 at night you have to yourself. Sometimes there is some things to do like polishing shoes or something like that. You pretty much at this time are to yourself. Not always. But quite often.

As you get further into those eight and a half weeks, you more and more often tend to have most of the weekends to yourself.

Q And what do you see the men doing during these periods? What are they doing?

A They just sit around quite often. On the weekends, when they have larger periods of time, if they can't get off the base, they usually go out into the field, something like that, buy some beer, just sit around and, you know, just try to keep themselves occupied for a whole day at a time, something like that.

Q Some of them read?

A Some of them read.

[112] Q Some of them watch television?

A Yes. There is a television in the barracks; and between 6:00 and 8;00 usually there is a considerable number of people down there or very often there is a considerable number of people down there watching it. And also on weekends.

Q Would you consider it any interference with your assigned duties to listen to a political candidate, a candidate for President of the United States, for one hour?

MR. HILL: Your Honor, I suggest this witness is incompetent to determine that question.

THE COURT: I'll allow it. Go ahead.

A No.

Q Now, have you been through an orientation briefing about the Fort during your training?

A Yes. We went through several orientations. I mean, we had—we were talked to by our own drill sergeant. We were talked to by the first sergeant of our company. We were talked to by some people of higher ranks—I can't remember what ranks they are, the higher ranks. You know, especially during the first week.

And especially during the first two weeks we had many, many orientations trying to tell us what things were happening, what was going on.

[113] Q All right. As a result of those talks and the advice that was given to you, what kinds of conduct have you kept away from?

A Well, one of the—well, there is several things they really stressed. One thing is not to go AWOL. That's one of their big points.

Another thing: to stay away from drugs. Those are probably the biggest two things that they push. Like during the first week, you usually hear both of those things about once a day or something like that from somebody.

Q What do you hear with regard to the openness or closedness of the base?

A Well, it was stated in some many words by our drill sergeant that it was—that it was an open fort. It was—it was stated by the first sergeant, too. They stated that usually, when they are giving talks on not going AWOL, they were telling how easy it would be to go AWOL. You know, they said you could just sort of walk off the post. You won't get stopped. Then they go on to tell you what will happen when you get back, if you come back and stuff like that. They paint a pretty grim picture of when you come back.

But it is stated definitely that it is an open fort.

[114] Q Did they tell you about any other consequences of it being an open base in terms of how you should behave at late hours or anything like that?

A Yeah. Another thing they tell us about, especially they re-emphasize this at the period when we get paid, is they tell you not to go out after dark by yourself,

to go at least with one other person. Especially at pay time they tell you this. They say because there is many, many people that just walk on the base, you know, many people from outside the fort that will, you know, mug you and roll you.

They say, you know, they don't know whether you have money until they've knocked you over the head with a pipe and, you know, by then it's kind of late even if you don't have the money. So, you know we are informed of that.

Q Anything about prostitution?

A Yes. Mainly they talk about Wrightstown, but in several instances they said that you, you know, you could find a prostitute on the base, especially after pay time they come up from both Philly and down from New York and also local people come in.

Q Have you looked through the literature made available in the PX and the other stores on the base?

A I haven't been to the main PX. I looked at the [145] PX which is near our company area, and I looked at the PX at the reception station.

Q What kind of literature?

A You mean the books or do you mean like the newspapers and stuff like that?

Q Newspapers, periodicals.

A Usually they are pretty much just—well, the newspapers are usually pretty much just local papers. I haven't seen a New York Times on sale, but there are things like Trenton papers or Philly papers usually.

Q Have you noticed anything that you recognized as endorsing or that you've read and seen endorsing anything other than the Democratic and Republican candidates for President and Vice President?

A No. Neither in the newspapers nor in any of the magazines at the PX. And I looked through several of the magazines in trying to find something to read. Haven't seen anything about any of the presidential candidates except for the major ones, the Democrats and Republicans.

MR. KAIRYS: Okay. Nothing further, your Honor.

CROSS-EXAMINATION
BY MR. HILL:

Q Mr. Campbell—excuse me. Private Campbell, [116] I guess, are you here pursuant to a subpoena that was issued today?

A (Nods head affirmatively.)

THE COURT: You must answer.

A Yes.

Q And who subpoenaed you?

A On behalf of the plaintiffs. Does that answer the question?

Q You were subpoenaed on behalf of the plaintiffs? Are you affiliated in any manner with any of the plaintiffs in this case?

A I know some of them. I've worked—I have done work for the Socialist Workers Party. I'm not a member of the Socialist Workers Party.

Q And you personally know a number of the candidates and a number of the plaintiffs in this case?

A A number of the plaintiffs. I have met. I don't know if they know me, but I know them by sight.

Q And you are currently a recruit; is that correct?

A Yes.

THE COURT: Are you through with basic?

THE WITNESS: No. I'm not through with basic.

THE COURT: Basic trainee.

Q You were restricted to base for the first [117] four weeks of training; isn't that true?

A Let's see. Well, I'm not sure on that. Yes, I believe that's true. Well, I believe that's true. If you mean as a general policy. If you mean whether I personally was or not, I was given a pass last weekend.

Q Last weekend. You weren't under any personal restriction, but your training unit is. Is that what you mean, for the first month or so?

A Yes. Roughly the first month. The first four weekends. I'm not sure whether it was the first four weekends or the first three weekends. People should be getting passes this weekend, so I mean—I guess you could count up the weekends if you want.

MR. HILL: That's all, Private.

MR. KAIRYS: Okay.

THE COURT: Thank you, sir. Stand down.

(Witness excused.)

MR. KAIRYS: That's the conclusion of our case, your Honor. I just move admission of all our exhibits.

THE COURT: I think they have been marked.

THE CLERK: Yes.

MR. KAIRYS: Okay.

THE COURT: Do you have any testimony?

MR. HILL: Your Honor, at this point we [118] could make several motions, but perhaps we can reserve with your permission for final argument in this case. We do have no witnesses.

THE COURT: You have none?

MR. HILL: We have no witnesses.

THE COURT: We'll take a ten-minute recess and you'll each have twenty minutes.

MR. HILL: Fine. Thank you.

(Recess)

[119] MR. KAIRYS: Your Honor, we filed a memorandum of law, so I won't repeat, but I would just like to summarize some of the basic concepts applicable under the First Amendment. We have traced how those concepts naturally and logically follow to the conclusion in the Flower decision of the Supreme Court and the Jenness case in the District of Rhode Island.

Any restraint on speech is presumptively invalid. That comes down to be most recently affirmed by Chief Justice Berger in the Keefe case where he rejected the rational basis test for judging deprivation of First Amendment rights. Where there is a flat and absolute ban on speech the presumption is just about irrebutable, again the Keefe case is an authority for that. The government must show a compelling state interest and they must show that they have chosen the least drastic means, the means which least imposes or infringes on First Amendment rights.

Now, all of this is suggested to your Honor and decided, certainly, by the Supreme Court with the knowledge that the military, just like the officials of any city, will have the authority to regulate reasonably the time, place and manner of exercising First Amendment rights, and we don't contest [120] that in the least. The point is—and this is formally documented in the brief—there is no such compelling interest. There is no legitimate reason, from the testimony you have before you today—and there certainly is no basis for allowing some forms of speech but not allowing political forms of speech, and by allowing or disallowing certain political forms of speech—and you have direct testimony on that. This record, I believe, is unprecedented in any of the cases in terms of discrimination based upon the political nature of the speech. It is very clear that you can do anything you want at the Base unless you exercise First Amendment rights. You can be there—like the chicken, just to get to the other side, the chicken who crosses the road. You can be there just to look around. You can be there just to be there, but if you are there and you exercise First Amendment rights, like handing out a leaflet, trying to address an assembly, then you are in violation of their regulations, they say, and they prohibit you from the Base, but they allow a rock concert of 5,000 people with loud music and dancing.

Can it be said that an address by a presidential candidate could be more disruptive or interfere more [121] with the military mission than a rock concert? I don't think it can, and I don't think political speeches would draw 5,000 people.

THE COURT: One of the witnesses here—and I just don't recall offhand who it was—stated flat out—I guess it was the first witness.

MR. KAIRYS: Colonel Johnson.

THE COURT: Colonel Johnson, yes. He said that very candidly, that any political campaign or otherwise which was anti-war was inimical to their mission.

MR. KAIRYS: Right. That is discriminating against speech based upon its content. They are picking a particular political view that the war in Vietnam is wrong

and saying, "That you can't express." That is what I meant when I said it was unprecedented in terms of coming from their own mouths. They indicated that an anti-war viewpoint can't be heard on that Base but others can.

THE COURT: Like what? They said they kept all political parties out.

MR. KAIRYS: None of the others have requested, as far as I know.

THE COURT: Does that matter?

MR. KAIRYS: They have not kept them out. Look [122] at the GI Times—the Army Times.

THE COURT: Those advertisements for a political party?

MR. KAIRYS: The Nixon platform is heard on that Base.

THE COURT: Say, for instance, if your clients had advertised in the New York Times—and I know the rates are very high—if they had advertised it would certainly appear at Fort Dix, wouldn't it?

MR. KAIRYS: Right. That is correct, but they have neither the means nor is that their style, really.

THE COURT: If I were running for President I wouldn't have the means to do it, either, and, believe me, I have no aspirations.

MR. KAIRYS: I would hope that they would let you in to the Base to be heard.

I would like to go through some of the matters raised by the defendants in their brief. First of all, this matter of irreparable injury. There can be no doubt that there is this irreparable injury as to all of these plaintiffs. Deprivations of First Amendment rights per se are irreparable injury.

THE COURT: That is really the problem, isn't it?

MR. KAIRYS: What?

[123] THE COURT: Whether or not the entire Base was at least a somewhat restricted area for military purposes, using the Flower incident as a criterion, and, secondly, whether they have been deprived of their First Amendment rights in view of what they allege to be a pressing need to keep an Army Base free—

MR. KAIRYS: On these facts this Army Base is more inundated with various forms of speech, including rock concerts.

THE COURT: A rock concert is not political.

MR. KAIRYS: No, but I say forms of speech. This record is far more full than the Flower record in terms of openness. All you had there was the number of cars coming in and out, which I don't know how to compare with this number. It's not clear whether it is more or less, and I don't think First Amendment rights depend upon the number of cars per day that go through, or you can take a certain cut-off point. You had that fact. You had the fact that people were allowed to walk on the Base and allowed to ride on the Base, as they are here, but in addition you have the Base holding rock concerts here. You have evidence of highly political partisan information being distributed on the Base. You have evidence of pamphlets being handed [124] out. They say "No," when it's a pamphlet. If the pamphlet were in favor of President Nixon do we know whether they would permit it to be handed out or not?

THE COURT: I would assume from the position that they have taken that, of course, they would ban it. I think the only leaflets—see if I am not right—the only leaflets were some distributed by children going around with notices of officers' wives having teas or something.

MR. KAIRYS: That is right.

THE COURT: And a weekly bulletin of activities on the Base.

MR. KAIRYS: That is right, but if they are going to allow various kinds of speech, various kinds of pamphleteering they can't stop that speech which is political. That is a thing that the First Amendment won't allow, and that is what this whole line of cases that leads up to Flower is about, I think.

Now, I would like to just address myself to a few of the matters raised in the brief of the defendants. They cite the Cafeteria Workers case. I should say that they mis-cite the Cafeteria Workers case. That was a

closed Base doing wholly classified work, and [125] the appellant in that case was an employee. There was no question of First Amendment rights. It was whether you could fire the employee without giving a hearing. It has absolutely no application.

They cite Adderley v. Florida, which was a demonstration attempted in a jail. The Court again distinguished places open to the public where people have a right to be, and they distinguish Edwards v. South Carolina that involved that fact situation. They said "No, this is a jail. The State has a compelling State interest in the security of a jail."

Similarly, Cox v. Louisiana, the compelling State interest was within the power of the courts.

Now, on Flower, this is a case that is on all fours with this case here. I get out of their brief four comments about Flower. First, we are told that it is a short per curiam decision so you should disregard it. It is a per curiam decision I presume for the simple reason that the decision, the result is obvious, and I think that the history of the First Amendment violation in this situation makes that result absolutely obvious. There were six Judges that put their names behind it and I don't think it is appropriate for this Court to try to figure out why it was per curiam, and I don't anticipate that [126] your Honor will. The idea that it should be disregarded because it is per curiam—if anything it's the other way around—usually a case obvious on its merits is decided per curiam.

THE COURT: I want to give you your full time but I want you to concentrate, if you will, on what is bothering me. In Flower the Court said—they just about waived any jurisdiction or restriction over that arterial highway. Isn't that what the Court said?

MR. KAIRYS: They didn't get in court and say "We waive it."

THE COURT: But by what happened there.

MR. KAIRYS: By those facts, with traffic going in and out, people walking, people having a right to be there. That's all.

THE COURT: Any restriction at all on the use of the street.

MR. KAIRYS: That is right.

THE COURT: They take the position that they have none here, haven't they?

MR. KAIRYS: Have not what?

THE COURT: If you want to use the word "waived" the rights over any street.

MR. KAIRYS: They took that position in Flower, [127] also, but the facts showed that the streets were open, as here. People could walk on them, as here. There is further evidence of all kinds of people visiting, and other kinds of speech in this case. There is also further evidence that they are basing their exclusion of speech on discrimination, both discrimination against all political speech and a certain content of political speech.

THE COURT: Didn't Colonel Johnson make quite clear—it would seem obvious to me that when they book such things as dance groups, music groups, and things of that nature—I am talking now about people up in training and administration lectures, that they are actually helping fulfill their mission, for instance a concert is obviously designed to help the morale of the men which is in accord with their mission. That is what they argued in Flower.

MR. KAIRYS: Perhaps the best way to get to the point is to go to the Circuit Court decision in Flower because it decided the affirmative of the point. As a matter of fact, the government's brief comes right out of that opinion. It cites all the same cases. It runs just right down the line exactly where the majority opinion did, except for Judge Simmons, and, of course, the Supreme Court reversed that majority [128] opinion and upheld Judge Simmons.

The 5th Circuit—this is the majority opinion held the Commander can summarily exclude anyone. That is what they ruled, and the authority for that was Cafeteria Workers, the case I just went over.

Second, that Fort Sam Houston is not open. It is a matter of license. They let you on when they want to

let you on. That is what the 5th Circuit ruled. That was reversed.

Thirdly, that the analogy offered by Flower—and I quote "between various public places and a military base is not in step with reality." That was reversed, also, and they said, finally, that there is no time for this on the basis of the interruption with the military mission, and that was reversed by the Supreme Court.

In other words, every one of those arguments that is being made here today was made there, and they were upheld by the 5th Circuit and reversed by the Supreme Court.

Now, if I can finish some of these points that I really feel are necessary to—unless you have any further questions on that—I would go along.

THE COURT: No. That's all right.

[129] MR. KAIRYS: At one point the government suggested that campaigning should not be the valid subject of a preliminary injunction because unlike leafletting, which is involved with Flower, it is more disruptive.

Well, I guess I take that that you should have a right to leaflet, and I firmly agree that the facts as to the four non-candidate claimants are really exactly like Flower, exactly, except they are now testing it by affirmative action rather than violating the Bar notice and being prosecuted criminally.

The government goes on to say that political rallies are by their nature disruptive, and I will quote, "A political rally by a national Presidential candidate would be a flop if it didn't interfere or disrupt." I don't know where that comes from or whether the candidates would take very kindly to that, the ones involved in this case or the other candidates. That is obviously not true. There are political rallies all over the place, especially these days, and they are not disruptive, and they don't interfere when they are scheduled at an appropriate time and place.

Then the government cites Lloyd v. Tanner, a [130] recent decision of the Supreme Court, saying that a shopping center may bar First Amendment activities,

and what they do is reverse the whole history and meaning of the First Amendment and turn it around in a way that I don't understand. It has always been the law that private property is not subject to the First Amendment. The First Amendment only bars the government from abridging rights. It doesn't bar private people or private institutions. That has been the whole historical development of the First Amendment.

All they did was enlarge the area of what they call private by including the center. That doesn't mean that what happened on things that are definitely not private but owned by the government is any different. It has really no effect in this case.

Now, there is this problem that if soldiers were to watch the address of a Presidential candidate, we are told, they would be violating military law, and that is the law that the government cites against participating in partisan politics. It is quite obvious that watching a candidate, just like watching President Nixon on television is not participating in partisan conduct and it is not a violation of military regulations. The very regulation they cite and provide [131] to your Honor and me in Appendix 3 says that these rules shall be interpreted as rules of reason and common sense shall apply. They also indicate in Paragraph 5-29 that military personnel are expected and encouraged to carry out their obligations as citizens and encouraged to vote.

Now, another argument that the government makes is that they might appear to be showing favoritism if they were to allow one of the plaintiff candidates on the Base, and I think that simply is clearly barred. No one could accuse them of favoritism any more than I agree with the Colonel's statement that the fact that that ad is in the paper doesn't show favoritism. It shows just they are allowing partisan political debate to go on in the Base.

Another allegation by the government is that since the claimant candidates are not from the major parties it really doesn't matter what right they have or what happens to them because they can't win, anyway, and

we have referred your Honor to Williams v. Resto, which laid that to rest very firmly.

As to the non-candidates we are told that the complaints are stale. They have waited too long. [132] They have bar notices which are in effect. Now they cannot go on to the Base, any of them, and they are subject to a six-month penalty as Flower got.

Then we are told that they should submit their material in advance. Now, that, first of all, was decided long ago in Lovell v. Griffin. The government may not scan in advance materials that are subject to First Amendment rights and judge them as to their content. That is what I was getting at in that whole line of questions about contents, and Flower decided that right on all fours.

Flower went on the first time. He didn't get authorization for what he distributed. He was picked up and given a bar notice. Then he went on again. Again he didn't get authorization and was convicted of a crime, for violating the bar notice.

The Supreme Court said that his activities were Constitutionally protected, that he had no obligation to get authorizations in the beginning or to submit his material. To the contrary, he did not, and what he did was Constitutionally protected.

I think I should be very clear that Flower was a leaflet distributor exactly like the four non-candidate plaintiffs.

THE COURT: Wasn't that advertising—I read [133] it three days ago—wasn't that advertising some sort of a function?

MR. KAIRYS: An anti-war function.

THE COURT: At another place, not on the Base.

MR. KAIRYS: So were these. Plaintiff Hardy announced a local demonstration outside of the Fort, McGuire, not in the McGuire Air Force Base, and the other ones that talked about demonstrations all talked about local demonstrations outside the Base.

THE COURT: But Dr. Spock wanted to come on the Base.

MR. KAIRYS: That's right, but he was not going to bring a rock group. He just wanted to come and talk to people.

Now, the government suggests some kind of a ruling as to Flower, as to what it is and what it is not. They said there must be extensive use by the public. Now, I don't know. I don't know how that applies. I don't think that that is the actual standard in Flower. I will get to what I think that Flower is in a second, but there is certainly as extensive use as in the Flower record. I think much more. It is hard to gauge what the 66,000 means. We have the statement by Mr. Stapleton who sat there for fifteen minutes and watched the cars that there [134] seemed to be more civilian than military. That is unrebutted by the government. We really don't know exactly where in that 66,000 the cut-off is, but 66,000 cars a day is a lot of travel on that highway. We have got a lot of testimony from all of the witnesses, the officers, as well as our civilians and military witnesses that there are civilians all over that Base, that they go all over the Base. There are a few areas they can't go, and they don't go. I find that extensive, but I think the more important point is that Flower I don't think sets out any kind of vague standard like that which it would be impossible, I think, your Honor to apply.

I think what Flower says "open" means that it is open in the sense that you have the right to be there for other purposes, and if you have the right to be there for other purposes they can't take away your right to be there for First Amendment purposes, and I'd like to quote two passages from the Flower decision. Two passages in that decision is almost the whole decision.

"The Fort Commander chose not to exclude the public from the street where petitioner was attending," and "One who is rightfully on a street which the State [135] has left open to the public carries with him there as elsewhere the Constitutional right to express his views in an orderly fashion."

They are talking about the right to be there, certainly. All of those plaintiffs had the right to be there,

have the right to go on there. Certainly even under the government's standard the use by the public of this Base is certainly extensive.

Again, I think it is far more open than the record revealed in Flower, and I think we have the addition of things like 5,000 persons at a rock concert, like people dancing. We have the point of discrimination that was actually shown. Usually it is the possibility of that kind of discrimination against political speech that has been the subject of victories in this kind of suit.

I would like, your Honor, if you would, just a brief opportunity, if you think it is appropriate, to reply to the government.

Thank you.

THE COURT: All right. Mr. Hill?

[136] MR. HILL: May it please the Court, we are dealing here today with a claim of First Amendment rights, and the government would be the first one to agree that in our society any such claim has got to be given the most serious consideration. And we are not here today saying that your Honor should shrug this claim off. We do think, however, that in addressing yourself to the problems that have been presented by this case, that there are other values in this case equally important to our society that you must keep in mind.

One of these values, at the outset, that I want to suggest to your Honor that you should keep in mind is maintaining the military as an institution that is not identified in any manner with politics or any political party.

Secondly, I suggest to you that society has a substantial interest in seeing that the military is permitted to fulfill its mission in this society, and that it not be interfered with in carrying out its mission.

I further suggest to your Honor that we would not be in court today but for the decision in the Flower case, decided by the Supreme Court on June 12th of this year. In fact, many of the witnesses [137] who testified on behalf of the plaintiffs indicated that they initiated their activity in direct reliance on the Flower case.

I have argued in my brief, and the government repeats here, that until the Flower case was decided it was unmistakably clear that a military Commander could summarily exclude civilian workers—not civilian workers, but civilians generally—from areas under his command. And I suggest in the Cafeteria Workers case the Supreme Court in that case gave a very careful history demonstrating the rights, the traditional rights of military Commanders to exclude civilians from their Posts.

We have also argued, however, that the right of a military Commander to exclude civilians from the Post is a right in line with other decisions of the Supreme Court, namely, the Adderley case and the Cox case, again referred to extensively in our brief, which indicate to us that when you have public property which is given some particular purpose and to which the public is not generally permitted, that this public property is treated as private property under those circumstances, that is, when they have a particular function which does not involve the general public. And I suggest to [138] you, that being the case, that those decisions are applicable to you today, and that's the relevance of the Lloyd v. Tanner case, which I will refer to a little later.

Turning briefly to the Flower case, we haven't argued that your Honor ignore the Flower case. We have argued to you that you must seriously consider the circumstances under which the Supreme Court decided that case. One of the difficulties with the Flower case, I can suggest to you, is mentioned by the attorney for the plaintiffs. He suggested to your Honor that your Honor is being presented with an unprecedented record, that is, of the facts surrounding civilian access to Fort Dix and surrounding the functions at Fort Dix.

The Supreme Court was not blessed with that kind of record in the Flower case. So for that reason, for the reasons that I argued in my brief, I obviously am not telling you to ignore the Flower case but I am saying "Look at it real carefully and see whether in your mind you read Flower as breaking new ground or whether you read it as consistent with the line of cases

that I referred you to: Cafeteria Workers, Adderley, Cox, Lloyd v. Tanner."

In examining the Flower decision and in compar- [139] ing the facts at Fort Sam Houston with the facts at Fort Dix, it seems to me that there are two comparisons that must be made. One, we have to compare the activity, that is, leafletting versus political campaigning.

Then I think we have to go a step beyond that. We have to compare what we know about Fort Sam Houston as revealed to us by the Circuit Court in the 5th Circuit and by the Supreme Court and the information that has been disclosed to you today as to what occurs at Fort Dix.

I think that comparison will demonstrate that political campaigning is a substantially different activity than distributing a rather innocuous leaflet that advertised a debate on a nearby campus where there would be both individuals present and a political campaign. Those are two different things.

First, I think that these are the factors that you have got to consider in Flower: Flower was quietly distributing innocuous leaflets. He was on foot. He was by himself. There was no disturbance whatsoever. There was no obstruction. He was on a sidewalk, which is a major thoroughfare in the City of San Antonio, Texas. It was a major arterial road that transported municipal traffic from one part of [140] San Antonio to another part of San Antonio, traffic by civilians as a thoroughfare twenty-four hours a day, traffic by all sorts of civilian vehicles having no basis or no reason to be on Fort Sam Houston twenty-four hours a day. There was no bound in Flower that he was distributing things. I think it is fair to say that the street at Fort Sam Houston was inundated by the public.

Okay. So we have the quiet leafleteer on the busy municipal street. Dr. Spock would like to campaign. The testimony has been that Dr. Spock, although he personally arrived with a party of three to six—

THE COURT: Three Secret Service men.

MR. HILL: Plus a couple of aides, I believe.

(Continuing)—but there were fifty to sixty people waiting at the outskirts to greet him carrying a banner.

I suggest to you that this is the nature of campaigning, that when you have a political candidate, he wants to go to the people. The people naturally tend to come to him. There is a commotion. It is disruptive—not disruptive in the sense that it is riotous, but disruptive in that it interferes with normal business activity, disruptive in that it attracts the attention of people who are supposed to be [141] carrying out their duty, disruptive in the sense that large numbers of people do gather; and I really suggest that Dr. Spock would be less than candid if he suggested that he didn't want to attract large numbers of people when he campaigned, and that he would be very disappointed if in fact he didn't attract a lot of people. I say this not—

THE COURT: Having campaigned myself, I know that your statement is perfectly valid. They like to see as many people as they can possibly get.

MR. HILL: This is not Dr. Spock. This is every politician.

THE COURT: Every—

MR. HILL: Whether it be President Nixon, George McGovern or candidates for Congress.

THE COURT: I can assure you that there is nothing more discouraging than walking into a hall and seeing about eleven people. It's like John the Baptist crying in the wilderness.

MR. HILL: So that is the context which I argue inherently is disruptive. Okay.

Now, let's compare—

THE COURT: Let me ask you this: Isn't there some testimony here about Route 68, whether it was a County or State road? It didn't come clear to me. [142] It goes right through the Fort.

MR. HILL: Your Honor, I think that I can fairly represent to the Court that at the time that Fort Dix was acquired that the State retained on behalf of the public—and I believe that this is in the affidavit of Colonel Olsen—a right of way for the public to traverse the Fort; and in that connection part of Route 68 does enter the Fort property, and there is one, or possibly two,

County roads that either go through or border the Fort property.

THE COURT: Isn't that the same thing as that business down at Fort Sam Houston?

MR. HILL: I don't think so. I don't think the fact that we have got an unknown quantity of—

THE COURT: Granted, though, that I don't place any activity on Route 68 from the testimony I have here. In other words, people handing out leaflets. There is no such testimony that they were handing it out on Route 68.

MR. HILL: And, in fact, it would not be possible to hand out leaflets on these County roads because there aren't sidewalks. I believe the testimony from Colonel Olsen was that there were very few sidewalks on the Post, that there were no arterial kinds of sidewalks, and I would suggest [143] that Route 68 does not have a sidewalk there.

THE COURT: Keep in mind that it is hard for me to visualize this. Of course, I haven't really studied that map the way I should, but it is hard for me to visualize just what was there.

MR. HILL: So, yes, we have got to concede that there is some civilian traffic that undoubtedly does traverse the Post using these County rights of way. But there are a couple of other factors that have got to be considered along with that.

First of all, the State of New Jersey has specifically given to the Federal Government the right to police those roads. And, in fact, the Federal Government asserts those rights. There has been abundant testimony with respect to the issuance of traffic summonses for traffic on these roads; the fact that they are not heard by a local judge, a local magistrate, the fact that the arrests are not made by municipal police, State Police; that in fact they are made by the Military Police. And they are heard, I understand, or generally by a Magistrate Rudd.

You also have the testimony that the MP's periodically will block those roads and inspect the vehicles that come through, at least with respect [144] to whether or not

they have decals, inquire as to their business. So I think if Flower—I think they say at Fort Sam Houston there was an abandonment or activity was permitted such as we must conclude that there was an abandonment. I suggest that when we have vigorous Military Police patrolling of all the roads, I don't think that you can say that there is an abandonment. When the Federal Government retains exclusive jurisdiction, and in fact enforces the jurisdiction that it has, I don't think you can say that there is an abandonment under those circumstances.

I would also, your Honor, like to specifically reiterate or reaffirm some of the testimony of both Colonels, Johnson and Olsen, regarding some of the other restrictions. We know, for instance, that peddlers who want to distribute goods, may not do so unless they are licensed by the Post. We know that sentries are posted when we're in time of specific need, such as when, you know, when they know demonstrations are going to be present, when they feel they would be an interference with the military mission. And I don't think you can forget that Fort Dix is located in a very rural area, and because of that the need for sentries, guarded [145] gates, is just not there. Its remoteness helps with some of the security problem. I think that that is a very critical factor in this case.

When you talk about other access, the testimony clearly was that at Fort Dix entertainment only is only brought on to the Base by express invitation, and it is brought on to the Base because it helps the military to perform its mission by giving the soldiers a little recreation, by trying to increase their morale. I think this is—for all times this sort of thing has been considered well within the military mission.

The other speakers that were mentioned only came on the Base by invitation and the prior testimony was that they were only brought on the Base when it felt that their efforts, either in management conferences or at the local chapel, would aid the military mission.

Now, you know, when we look at Fort Sam Houston, we know, your Honor, none of these facts about that case.

What we do know is that we had a—First of all, Fort Sam Houston was not limited—there was no discussion whatsoever about the entire Fort. The discussion was limited to this one major thoroughfare, major municipal thoroughfare that had a sidewalk that [146] was used by the people. We had the distribution right on the sidewalk. The sidewalk was used around the clock. We know we were in the middle of a busy city at this point, and it was just municipal traffic cutting through the Base. I really think that there is an inference there that the Court must consider.

Now, I've argued to you previously that when you consider the Flower case that you also have to consider the Flower case in the context of Lloyd v. Tanner. As you will recall, Lloyd v. Tanner involved a local shopping area, privately owned albeit, but expressly opened to the general public. The general public was encouraged to tour the mall area, to come for every purpose except to distribute leaflets. And the Court there said that this being private property, they had to say "No leaflets." But the Court also in its opinion in Lloyd v. Tanner, referring to Adderley and Cox, said that even in many or a number of situations public property is treated like private property. So that just goes back to my initial point, that when you look at Flower I think you'll have to confine it very carefully to the facts in that case.

Now, what is it that the military is trying to [147] protect? Obviously, we have a military mission at Fort Dix, and we want to make sure that that military mission is protected. Plaintiffs, I think, have admitted in fact that there is a military mission that must be protected and they keep reiterating that they would abide by reasonable regulations as to time, manner and place. I think that that concedes that there is a military function on the Base that's got to be protected.

I point out initially that it seems to me it puts the military in a very difficult position if this Court were to take it upon itself to divide up the Base and to say, "Well, here you can do this and here you can't do that." Fort Dix is so big and sprawling, I suggest that that's

very difficult, if not impossible for a Court to do. So you have got to consider the overall mission of the Post, as pointed out in the affidavit of Colonel French, to which Affidavit there has been no rebuttal, by way of affidavit or rebuttal testimony. We know that Fort Dix is a training camp for basic—for recruits. We know that recruits are given a very highly intensified eight and a half week training course. We know that they are on a tight schedule. We know that the demands on their physical energy are rough. We know [148] that they are restricted to post the first four weeks for a reason, really, to insure that they become adjusted to, right at the outset, to military discipline, military training. I suggest that political campaigning on a base would necessarily interfere with the reasons which keep many recruits restricted to the Post.

Then I also think it is very important for your Honor to recall what I think was extremely candid testimony by Colonel Johnson. Colonel Johnson came out and told your Honor repeatedly that the military is trying, as an institution, to stay completely out of the political arena. They want nothing to do with it whatsoever. They don't even want a hint or suggestion that they are involved in political processes.

And this is, as you well know, historically the policy of this government, that politics and civilians and military simply don't mix.

I would like in that connection to read to you just briefly from Army Regulation 360-61 which talks about Army participation: "Army participation and cooperation is not authorized when such participation may directly or indirectly endorse or selectively benefit or favor or appear to endorse [149] or selectively benefit or favor a private individual, group, corporation, whether for profit or non-profit, sect, fraternal organization, quasi-religious or ideological movement, political group or commercial venture or be associated with solicitation of votes in a political election."

THE COURT: Mr. Kairys says you do by allowing political advertising in groups.

MR. HILL: Your Honor, I think it is very innocuous. I don't think that the public would ever associate the military with a political candidate to the extent that it lets in reading matter.

THE COURT: Of course, the answer to that is nothing is prohibiting that particular party or candidate from doing the same thing.

MR. HILL: That's right.

THE COURT: I suppose. Go ahead. You've got about three or four more minutes.

MR. HILL: Right. I want to make a clear distinction for you, which was made in the brief, between Dr. Spock and the plaintiffs who are not candidates for political office. We have four leafleteers that are also plaintiffs. I strongly suggest to you that the laws regarding these plaintiffs, the pamphleteers, are different from those concerning Dr. [150] Spock, that there are different circumstances surrounding each of these pamphleteers.

THE COURT: That's obvious; isn't it?

MR. HILL: Right. And for that reason at some point in the case we ought to sever this case and deal with each separately. That's Point No. 1.

In Point No. 2 there are two very recent decisions which I have referred to in our brief specifically upholding the regulations which I have cited to you in my brief requiring people who wish to distribute pamphlets to submit them to the Adjutant General in advance to determine whether they should be distributed. The major case was the Schneider case. In the Schneider case it turns out it was dissemination of the pamphlets that was denied. Cert. was denied in the Schneider case just after the Supreme Court decision in the Flower case.

So I suggest to you that if the Supreme Court thought that the Flower case was determinative of the Schneider-type situation, that is, the requirement that there be submission to the Adjutant General in advance, cert. would not have been denied in that case; and that leads you to as: What does Flower mean? I think we ought to consider Flower in its [151] criminal context, and in a criminal context no purpose would have been served.

You couldn't have done anything subsequent to the court or prior to the court date submitting something to the Adjutant General. I mean, once the arrest was made, that was it.

I have set out for you in my brief the criteria for a preliminary injuction. I think there is substantial doubt as to what Flower means. I do not think that Flower permits Dr. Spock to campaign or any other candidate to campaign. Consequently, I suggest that there is no proof that there will be a probability of success.

I think that I demonstrated to you that the public has an interest in not having the military associated with politics, which gives you a counter-balancing equity.

On the other point I've made my points in my brief and I'll rely on those.

I wish to make to you one other argument that was not advanced in the brief and which I can in the near future submit to you a memorandum on. I suggest to you that there is no jurisdiction in this Court to consider these cases to the extent that we are dealing with the claim that jurisdiction [152] lies under the Federal Question Statute, that is, Section 1331. I think the Goldsmith line of cases applies. In Goldsmith there was an effort to have the District Court adjudicate a person's right to disseminate leaflets. The District Court said you do not place a dollar figure on the right to distribute leaflets; and, consequently, you can't satisfy the $10,000 jurisdictional amount required. That's Goldsmith v. Sutherland, 426 F. 2d 1395.

THE COURT: Which Circuit?

MR. HILL: The 6th Circuit, 1972.

THE COURT: All right.

MR. HILL: Okay? I'd also suggest to you that there is no jurisdiction under the Administrative Procedure Act as alleged in the complaint inasmuch as we're dealing with what is clearly a discretionary function on the part of the Commander. I suggest that you read Section 1343, which the plaintiffs also assert as a jurisdictional ground, and that the statute clearly does not apply to this situation where there has been no denial of the right to vote whatsoever.

I would ask, therefore, that the case as to the leafleteers be dismissed for failure to submit a claim—the pamphlets to the Adjutant General, and [153] that both complaints as to the national candidates and as to the leafleteers be dismissed on jurisdictional grounds, and, in any event, I don't feel that any of the plaintiffs have stated facts that relief should be granted, upon the reasons which I have argued.

Thank you.

THE COURT: Five minutes, Mr. Kairys.

MR. KAIRYS: Okay. I will be very brief.

First, your Honor, the government comes back to this point that political rallies are inherently disruptive. Well, it's very clear that disruption is not—

THE COURT: It can be, but generally are not. I mean, I understand that.

MR. KAIRYS: Okay. But it's very clear that disruption is not the problem here. They will tolerate disruption on this military base for certain purposes. They will tolerate it for a rock concert, which is eminently more disruptive than any political rally can be.

THE COURT: I don't know how it is disruptive except for the eardrums. Why anybody likes it, I don't know.

MR. KAIRYS: Okay. Secondly, your Honor, it [154] seems to me they conceded to the candidate plaintiffs and they are indistinguishable from Flower. He called Flower a quiet, innocuous leafleteer. Well, that's the evidence as to all four of the leafleteers here.

Thirdly, the Jenness suit in Rhode Island was filed before the decision in Flower and with very good cause, based on the First Amendment law that I extensively cited to your Honor. It did not depend on Flower. It is not the situation that people are just starting a suit like this because of the Flower decision, that that was any new lease in the law. As a matter of fact, that Court is now reconsidering its opinion upon the application of the plaintiffs in that it did not go far enough concerning the interperimeter area. There is a petition for consideration right now pending in that court.

Fourthly, your Honor, the exclusion of Dr. Spock occurred on the Wrightstown-Pemberton Road just outside of Wrightstown about ten feet from a store in Wrightstown. That's where the Base begins and that's a County road. That happened right on one of the State's roads.

Finally, your Honor, all of these things, everything the government has raised, was considered in Flower. I think it's clear as to the leafleteers. [155] It's clear as to Presidential candidates, First Amendment rights, voting context, election context are certainly as stringent as they are for a leafleteer. We always have the caveat as to any of these claims that we make that they can regulate the time and the place and the manner of exercising First Amendment rights. We don't challenge that at all.

And I just suggest, finally, your Honor, that one of the things going on in Flower, and one of the things that you might consider, is that it's also part of the military mission to uphold the Constitution of the United States.

Thank you.

THE COURT: I will reserve decision, gentlemen.

Could I see you in chambers about that, just about that very point I want to talk to you, in case you want to give something else to me. We are going into a holiday weekend and I know you are in a rush.

MR. KAIRYS: Sure.

THE COURT: All right, I will talk to you.

(Hearing adjourned.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed October 13, 1972]
[Title Omitted in Printing]

ORDER

This matter being opened to the Court by Kairys & Rudovsky, attorneys for the plaintiffs, David Kairys, Esquire appearing, in the presence of Herbert J. Stern, United States Attorney for the District of New Jersey, attorney for the defendants, Richard W. Hill, Assistant United States Attorney appearing, upon application for a preliminary injunction enjoining defendants, their agents and employees from interfering in any way with plaintiffs' exercise of their alleged constitutional right to conduct political campaigning and to distribute pamphlets on the Fort Dix military reservation and directing defendants to permit such campaigning and distribution of pamphlets subject to reasonable regulation by defendants as to time, manner and place, and the Court having considered the facts stipulated by the parties, the affidavits submitted by the parties, the testimony and documents received into evidence at the hearing held on October 4, 1972 and the argument of counsel, and for good cause:

It is, on this 13th day of October, 1972

ORDERED that plaintiffs' application for a preliminary injunction be and hereby is denied for the reasons set forth in the opinion of this Court filed in this matter on October 12, 1972, which opinion constitutes the findings of fact and conclusions of law required by Rule 52, Federal Rules of Civil Procedure.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1934

BENJAMIN SPOCK; JULIUS HOBSON; LINDA JENNESS; ANDREW PULLEY; SOCIALIST WORKERS PARTY; JOHN GINAVIN; DONALD MISCH; ALAN HARDY and ROBERT STANTON, APPELLANTS

vs.

BERT A. DAVID, Commander,
Fort Dix Military Reservation,
MELVIN LAIRD, Secretary of Defense

(D. C. Civil Action No. 1621-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS and ROSEN, Circuit Judges
and LAYTON, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12 (6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 12, 1972, be, and the same is hereby reversed and the cause remanded for the entry of a preliminary injunction directing the defendants to cease from interfering with the political campaigning by the candidate plaintiffs Spock, Hobson, Jenness and Pulley or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation between the date hereof and November 7, 1972. The order may provide that the right

of the candidates to campaign and the distribution of campaign literature shall be subject to such restrictions as to time, place and numbers of persons involved, as shall have been shown by the defendants to be necessary to prevent interference with the military functions of the base, and the flow of military and civilian traffic, but shall not provide for the prior approval by any authority of the contents of any communication. The cause should be set down for a final hearing promptly to dispose of the claims of the candidate plaintiffs for injunctive relief after November 7, 1972, and of the claims for injunctive relief of the barred pamphleteer plaintiffs, all in accordance with the opinion of this Court. Costs taxed in favor of appellants.

ATTEST:

/s/ Thomas F. Quinn
Clerk

Dated: October 27, 1972

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed December 4, 1972]

[Title Omitted in Printing]

ANSWER

Defendants, Bert A. David, Commander, Fort Dix Military Reservation and Melvin Laird, Secretary of Defense, through their attorney, Herbert J. Stern, United States Attorney for the District of New Jersey, by way of answer to the complaint say:

1. Defendants deny paragraphs 1 and 2.

2. As to paragraph 3 of the complaint defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that Benjamin Spock is a resident of New York. Defendants admit that at the time the complaint was filed plaintiff Spock was the Presidential candidate of the Peoples Party in the 1972 election. Defendants contend, however, that at this time the plaintiff Spock is no longer a Presidential candidate.

3. As to paragraph 4 of the complaint defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that Julius Hobson is a resident of Washington, D.C. Defendants admit that at the time the complaint was filed plaintiff Hobson was the Vice-Presidential candidate of the Peoples Party in the 1972 election. Defendants contend, however, that at this time the plaintiff Hobson is no longer a Vice-Presidential candidate.

4. As to paragraph 5 of the complaint defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that Linda Jenness is a resident of New York. Defendants admit that at the time the complaint was filed plaintiff Jenness was the Presidential candidate of the Socialist Workers Party in the 1972 election. Defendants contend, however, that

at this time the plaintiff Jenness is no longer a Presidential candidate.

5. As to paragraph 6 of the complaint defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that Andrew Pulley is a resident of New York. Defendants admit that at the time the complaint was filed plaintiff Pulley was the Vice-Presidential candidate of the Socialist Workers Party in the 1972 election. Defendants, contend, however, that at this time the plaintiff Pulley is no longer a Vice-Presidential candidate.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 7, 8, 9 and 10.

7. As to paragraph 11 of the complaint defendants admit that they are sued in their official capacity for actions taken by them in their official capacity. Defendants further admit that Bert A. David is Commander of the Fort Dix Military Reservation and that Melvin Laird is the Secretary of Defense of the United States. All other allegations of paragraph 11 are denied.

8. As to paragraph 12 of the complaint defendants admit that the Fort Dix Military Reservation covers 55 square miles. Defendants further admit that when the land comprising Fort Dix was ceded to the federal government the State of New Jersey retained right of way easements on certain county roads within the territorial limits of the base. These roads are used by military and civilian personnel employed at the base and at times by other civilians. Defendants further admit that military personnel reside on the base with their dependents. All other allegations of paragraph 12 are denied.

9. As to paragraph 13 of the complaint defendants admit that the plaintiffs on September 9, 1972, directed a letter to defendant David. Defendants allege that the letter speaks for itself. All other allegations of paragraph 13 are denied.

10. As to paragraph 14 of the complaint defendants admit that by letter dated September 18, 1972 defendant David responded to the September 9, 1972 letter mentioned in paragraph 13 of the complaint. Defendants

allege that the letter speaks for itself. All other allegations of paragraph 14 are denied.

11. As to paragraph 15 of the complaint defendants admit that they were advised prior to September 23, 1972 that plaintiffs Spock and Pulley intended to come on to the Fort Dix Military Reservation on September 23, 1972. All other allegations of paragraph 15 are denied.

12. As to paragraph 16 of the complaint defendants admit that plaintiffs Spock and Pulley approached an entrance to Fort Dix at approximately 11:00 A.M. on September 23, 1972 and were met by Colonel James Simon. Attached hereto as Exhibit A and incorporated herein is a transcript of the conversation between Colonel Simon, plaintiffs Spock and Pulley and their attorney David Kairys. Defendants allege that the transcript speaks for itself. All other allegations of paragraph 16 are denied.

13. Defendants deny paragraphs 17 and 18 of the complaint.

14. Defendants admit to the allegations of paragraph 19 except that they allege that Ginaven and Misch were distributing the described booklets in a parking lot within the Fort Dix Military Reservation and not on a sidewalk.

15. In answer to paragraph 20 of the complaint defendants admit that on February 24, 1972, plaintiff Alan Hardy was placing anti-war demonstration posters on the windshields of cars in the parking lot of Timmerman Theater. This theater is geographically located in the middle of the Fort Dix Military Reservation. Hardy was escorted off the base and issued a letter of ejection. All other allegations of paragraph 20 are denied.

16. Inasmuch as Fort Dix records do not go back as far as 1968, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21.

17. Defendants deny paragraphs 22, 23, 24 and 25.

18. As to paragraph 26 of the complaint defendants admit that the plaintiffs in this action have not instituted any other action in the United States District

Court for New Jersey seeking the relief sought in this complaint. Plaintiffs Spock, Jenness, and the Socialist Workers Party, however, have instituted similar litigation in the United States District Court for the District of Rhode Island.

AFFIRMATIVE DEFENSES

1. This court lacks subject matter jurisdiction.

2. This suit is in legal effect a suit against the United States which is barred by the doctrine of sovereign immunity.

3. Plaintiff pamphleteers failed to pursue or exhaust the administrative procedures set forth in Fort Dix Regulation Number 210-27 which prohibits the distribution of pamphlets or other writings at Fort Dix without prior written approval of the Adjutant General, Fort Dix.

4. Plaintiffs Alan Hardy and Robert Stanton are guilty of laches.

5. If it is alleged that the candidate plaintiffs have a special right to campaign because of their status as candidates, their candidate status ceased as of November 7, 1972, and any such special right was lost.

6. On information and belief one or more of the plaintiff candidates were ineligible under the Constitution of the United States for the office they sought. Any such candidates cannot, therefore, be considered bonafide candidates or be entitled to any special rights that candidates may enjoy.

7. There is no constitutional right to engage in political campaigning or distribute pamphlets on a military base.

8. Plaintiff candidates are improperly joined with plaintiff pamphleteers.

9. The complaint fails to state a claim upon which relief can be granted.

10. Plaintiff Socialist Workers Party lacks standing to prosecute this action.

11. The action of the defendants in barring the candidate plaintiffs and excluding the plaintiff pamphleteers was neither arbitrary nor discriminatory.

HERBERT J. STERN
United States Attorney

By /s/ Richard W. Hill
RICHARD W. HILL
Assistant United States Attorney

EXHIBIT A

TRANSCRIPT—CONVERSATION BETWEEN COLONEL SIMON, SPOCK, PULLEY AND DAVID KAIRYS, ESQ.

ANNEXED TO FOREGOING ANSWER

MR. KAIRYS: Colonel Simon, I'm David Kairys. This is Andrew Pulley, and let me present Dr. Benjamin Spock.

COLONEL SIMON: Doctor Spock, How do you do sir.

MR. PULLEY: We came to see if we can talk to the GI's on the base about both our campaigns, given the fact that GI's have a right to vote and given the fact that in New Jersey that GI's can vote in New Jersey ballot. We think that they should have at least the right to hear the different issues. To this present date there is no doubt that GI's at Fort Dix have only heard from Agnew and Nixon and McGovern. They have yet to hear from my party, the Socialist Workers' Party or the party of Dr. Spock. Now, there was a recent ruling in Quonset Point where the federal court decided that it was perfectly legitimate to come on the base, on the open base on the open areas to address GI's and we want to exercise that right now.

DR. SPOCK: I would emphasize among other things, again, that the federal court, in deciding that we could not go on the closed part of parks, it said of course we could go on the open part of a base or any base that was entirely open. I would also reiterate the point if a soldier is entitled to vote, then it seems to us he's entitled to not only hear the issues but also to meet the candidates. It seems to us it's a mistrust of the American system when an Army base is afraid, apparently, to let its armed personnel hear the issues and speak to the candidates. It seems to us it is a mistrust of the American system.

MR. KAIRYS: Colonel, I would just like to point out as was pointed out in the letter written to the Commanding Officer, the Supreme Court of the United States has ruled that public areas of a military base are subject to the First Amendment and that anyone, including certainly a candidate for president or vice-president, should have access to those areas and be entitled to speak to people and hand out literature, and that is all they want to do. They don't come here for any disruption or any kind of chaos or anything that would interfere with the operations of the base, and they only ask that they be allowed to speak to the GI's, who I understand a lot of them have a day off today. They have been also ordered, the GI's, in a regulation to be very interested in voting and to vote themselves and in order to vote, in order to hear the candidates from these two parties they would have to hear them in public, in person as in this because they don't get the media coverage that Nixon and McGovern get.

DR. SPOCK: I was interested as we drove through the base to see a large sign there, Colonel Simon, saying Fort Dix is an equal opportunity employer. I didn't know whether that meant just civilian employees or whether that meant military employees. Certainly it seems to be equal opportunity means opportunity to hear the issues and see the candidates.

COLONEL SIMON: Well, we are certainly an equal opportunity employer here at Fort Dix, Dr. Spock, which means that we hire people regardless of their race or creed. Now, as I understand your letter that you have sent to me on the 9th of September, you asked for permission to come on the Post for the purpose of campaigning among the troops and for the purpose of distributing literature, campaign literature, among the troops. Is that correct?

DR. SPOCK: Correct.

COLONEL SIMON: And as I understand it, Mr. Pulley, you had your signature on the letter also.

MR. PULLEY: Correct.

COLONEL SIMON: As I understand it, that's your purpose in coming here today.

DR. SPOCK: Correct.

COLONEL SIMON: Now, as you know on the 18th of September we replied to that letter. The Commanding General of this post replied that campaigning, by not only Dr. Spock and Mr. Pulley but by any candidate, on the Fort Dix reservation is prohibited, not only by Fort Dix regulations but by Army regulations. Political speeches and campaigning on Fort Dix, the distribution of literature on Fort Dix without the prior approval of the Adjutant General of this post is prohibited. Fort Dix is an exclusive federal reservation. We have a military mission here to accomplish. No other candidate, other than yourselves, have asked for permission to come on the post to campaign. Had they requested, the reply would have been the same, regardless of the party or the person applying.

DR. SPOCK: Colonel Simon, do you mean to say that if President Nixon wanted to come here and give a semi-political talk, the Commanding General would tell him he could only come if he kept strictly away from politics?

COLONEL SIMON: Doctor, we are all working for the federal government. President Nixon is our commander-in-chief. I doubt very much that according to the rules that have been published by the Army, by Department of the Army, by the Department of Defense, that President Nixon would ask to come on post to conduct a political campaign. But the rules as they apply govern us, and those rules are that we cannot permit it.

MR. PULLEY: Vice-presidential candidate Agnew recently spoke and toured on the Navy installation of Quonset Point. Vice-President Agnew is not a part of the chain of command, but yet he's a candidate for the office of vice-president again. And yet he is allowed to do such a thing. The court ruling that Quonset Point did not leave Fort Dix out of the general approach

that the court ruling decided that is it decided that we could campaign on any open area on any open base, and I understand that Fort Dix would officially be an open base. The federal court passed the major ruling themselves and it is clear from what you had to say that you are going totally against what the court just ruled. Also one other thing. I understand that when I was in the service the main order that I was given before being inducted was that my cause was to defend the U.S. Constitution against all aggressors, both foreign and domestic. It appears to me that what is being done here is that it is not the constitution that is being defended, but the fact that the constitution is being violated by the top officials of the US Army at Fort Dix. We plan to take this case all the way to the Supreme Court if necessary to win our rights to campaign on this base. We think GI's do have a right to hear the views of both the People's Party and the Socialist Worker's Party.

DR. SPOCK: Certainly we have not come here in our own interests. We are both candidates of parties that have high idealism. We are coming here because we believe citizens have rights and we come here to help the citizens who happen to be in the military to exercise their rights to be informed about the election. So I think that it should not be emphasized that it is our rights as much as it is the rights of the armed service personnel. I certainly agree that if there are regulations here flatly disallowing us to come onto the base, even an open base like this, then all we can do is go to court, because it seems absolutely clear that the constitution does not say that a soldier loses his civil rights when he comes into the armed services and we are going to fight for that.

COLONEL SIMON: Well, I appreciate your views gentlemen; and this is a matter that I am sure will be ultimately decided by the courts and that's the proper forum for an argument of this type.

DEFENDANT'S EXHIBIT EV-37A-C1621-72

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed December 8, 1972]

[Title Omitted in Printing]

INTERROGATORIES

To: KAIRYS & RUDOVSKY, ESQUIRES
1427 Walnut Street
Philadelphia, Pennsylvania 19102

TAKE NOTICE that the defendants require the plaintiffs to answer the following interrogatories under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure within 30 days from the date of service hereof:

1. State the date and place of birth of each plaintiff.
2. State the current address of each plaintiff.
3. State the names and addresses of all persons having knowledge of facts relevant to this litigation.
4. As to plaintiffs, Ginaven, Misch, Hardy and Stanton, state whether application for permission to distribute pamphlets was made to the Adjutant General, Fort Dix, prior to distributing the pamphlets which resulted their ejection from Fort Dix.
5. If the answers to interrogatory 4 is in the affirmative state the following for each person:
   a. Date application was submitted. Attach copy of application.
   b. Date application was approved or disapproved by the Adjutant General, Fort Dix.

HERBERT J. STERN
United States Attorney

By /s/ _____
RICHARD W. HILL
Assistant United States Attorney

I certify that the foregoing statements by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

_____

Dated:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Filed January 3, 1973]

[Title Omitted in Printing]

PLAINTIFFS' RESPONSE TO INTERROGATORIES BY THE DEFENDANTS

Pursuant to Rule 33, and in response to the interrogatories propounded by the defendants, David Kairys, Esq., counsel for plaintiffs, deposes and responds as follows:

1. and 2. For each plaintiff:

Name and Address	Date of Birth	Place of Birth
Benjamin Spock c/o Antilles Yacht Service The Lagoon Estate Frydenhoj P.O. Box 721 St. Thomas, Virgin Islands 00801	May 2, 1903	New Haven, Conn.
Julius Hobson 1319 4th St., S.W. Washington, D.C. 20024	May 29, 1922	Birmingham, Alabama
Linda Jenness 410 West Street New York, New York	Jan. 11, 1941	El Reno, Oklahoma
Andrew Pulley 410 West Street New York, New York	May 5, 1951	Greenwood, Mississippi
Socialist Workers Party 14 Charles Lane New York, New York	1938	
John Ginaven 1268 Kelmar Ave. West Chester, Pa. 19380	June 13, 1941	Akron, Ohio

Name and Address	Date of Birth	Place of Birth
Donald Misch Winthrop House G-21 Harvard College Cambridge, Mass. 02138	Nov. 23, 1951	Chicago, Ill.
Alan Hardy 4816 Hazel Ave. Phila., Pa. 19143	April 8, 1943	Rochester, N.Y.
Robert Stanton 4714 Springfield Ave. Phila., Pa. 19143	Dec. 5, 1947	Phila., Pa.

3. There were many witnesses to the exclusion of the candidate plaintiffs from the Base on September 23, 1972, including representatives of defendants. The following persons witnessed the incident involving Plaintiffs Ginaven and Misch:

Tom Gaffney
1309 Medford Rd.
Wynnewood, Pa. 19096

Jon Landau
141 Harvey St.
Phila., Pa. 19144

Jerry Fritts
254 South 23rd St.
Phila., Pa. 19103

4. Plaintiffs Ginaven, Misch, Hardy and Stanton did not make prior applications for permission to distribute pamphlets.

I hereby certify, under penalty of law, that the foregoing statements are true to the best of my knowledge, information and belief.

/s/ David Kairys
David Kairys

Dated: December 29, 1972

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed January 10, 1973]

[Title Omitted in Printing]

NOTICE OF MOTION

To: Kairys & Rudovsky, Esqs.
1427 Walnut Street
Philadelphia, Pennsylvania 19102

PLEASE TAKE NOTICE that on January 29, 1973, the date set for trial in this matter, at 10:00 A.M. in the forenoon or as soon thereafter as counsel may be heard, the undersigned attorney for the defendants, will apply to the United States District Court for the District of New Jersey, Honorable Clarkson Fisher, United States Courthouse, Trenton, New Jersey, for an order dismissing the complaint on the following grounds:

1. This court lacks subject matter jurisdiction
2. This suit is in legal effect a suit against the United States which is barred by the doctrine of sovereign immunity.
3. Plaintiff pamphleteers failed to pursue or exhaust the administrative procedures set forth in Fort Dix Regulation Number 210-27 which prohibits the distribution of pamphlets or other writings at Fort Dix without prior written approval of the Adjutant General, Fort Dix.
4. There is no constitutional right to engage in political campaigning or distribute pamphlets on a military base.
5. Plaintiff Socialist Workers Party lacks standing to prosecute this action.
6. Such other grounds as may appear at the time of trial.

The defendants will rely on briefs previously submitted to the Court.

HERBERT J. STERN
United States Attorney

By /s/ Richard W. Hill
RICHARD W. HILL
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS

Trenton, New Jersey

Monday, January 29, 1973

BEFORE:

HONORABLE CLARKSON S. FISHER, U.S.D.J.

APPEARANCES:

HERBERT J. STERN, United States Attorney,
BY: RICHARD W. HILL, Assistant U.S. Attorney,
For the Government.

BALL, BROEGE, ELWELL, FOGEL & LIVINGSTON and KAIRYS & RUDOVSKY (Pennsylvania Bar),
BY: DAVID KAIRYS, Of Counsel,
For the Plaintiffs.

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[2] MR. KAIRYS: Good morning, your Honor.

THE COURT: Good morning. Are you ready to proceed in Spock against David?

MR. KAIRYS: Yes, we are.

MR. HILL: Your Honor, I think several points should be made preliminarily. First, the Government has pending today a motion to dismiss. Would you prefer that this be held until the conclusion of the testimony?

THE COURT: Yes.

MR. HILL: Okay. In that event, that will be held. I think that also it would be appropriate at the outset of this hearing to get perfectly clear, for the record,

what will be the final record in this case, if that is agreeable with Mr. Kairys—

MR. KAIRYS: Sure.

MR. HILL: —to approach it along those lines. First of all, it would be satisfactory with the United States Attorneys' office if everything that was of record at the time of the—or for the hearing on the application for preliminary injunction be considered as part of the final record in this case.

MR. KAIRYS: Absolutely. We join with [3] you and so move.

THE COURT: All right.

MR. HILL: And I just want to indicate that this would specifically include four affidavits that were filed by the United States, those of Colonel Olsen and French, and two affidavits of Major Beattie.

MR. KAIRYS: Your Honor, we have agreed to waive any hearsay objections to those affidavits. We don't admit the truth of anything said in there or the facts stated, but just that we are waiving the hearsay objection.

THE COURT: All right. Fine.

MR. HILL: And I think with the general conclusory statement that everything that was of record originally is of record on the final hearing, we are prepared to take testimony.

MR. KAIRYS: Okay. Your Honor, just by way of brief introduction, primarily, our witnesses today will concern the issue of jurisdiction. In addition to that, we have a few pictures to offer to you of the Base that go to the main case, but it's merely jurisdiction. We will make it as brief as we can.

THE COURT: All right. Will you finish [4] today?

MR. KAIRYS: Definitely.

THE COURT: Oh, good.

MR. KAIRYS: I don't know how much Mr. Hill has, but we will be finished very shortly.

MR. HILL: I have four or five witnesses, your Honor, but it's my belief that their testimony will be relatively brief and that we should be able to conclude today.

THE COURT: All right.

MR. KAIRYS: John Ginaven, take the stand, please.

JOHN GINAVEN, called as a witness on behalf of the plaintiffs, being first duly affirmed, testified as follows:

DIRECT EXAMINATION
BY MR. KAIRYS:

Q Mr. Ginaven, you are one of the plaintiffs in this case; are you not?

A That's correct, yes.

Q And where are you working now?

A I work for C.C.C.O., an agency for miliary draft counseling in Philadelphia.

Q Now, I asked you, Mr. Ginaven, to find out some costs of alternative means of getting information to soldiers on Fort Dix; did I not?

[5] A Yes, you did.

Q Could you please recite for the Court what you found?

MR. KAIRYS: Now, perhaps we should say right, now, Mr. Hill has agreed some of this is hearsay, and, he, similarly to my waiving of the objection before, he's not admitting the truth or the relevancy, but he has agreed not to object as to hearsay; is that correct?

MR. HILL: That's right. Your Honor, to the extent that this witness presents hearsay testimony as to the costs of their advertising and various media, for instance, newspaper advertisements, television, I'm not going to make any hearsay objection as to the cost data that is adduced.

I do have a relevancy objection. I see no relevancy whatsoever in this proceeding as to the cost of alternative means of presenting a point of view to Fort Dix. I do not believe that is the obligation of any of the defendants in this matter or the United States Government to make any of its decisions based on analysis of the ability of any of the plaintiffs to advertise or campaign using one method as opposed to another method. I surely think that would be the wrong approach for the Govern-

ment to take [6] with respect to this kind of problem. That's my relevancy objection.

THE COURT: All right. I'll accept the evidence. I will worry about its relevance later, because there is no question this matter is going to be reviewed.

MR. KAIRYS: Its only purpose in being offered is not to have any relation to what the defendants must or must not do but only for the purpose of jurisdiction, your Honor. That's all. So it really isn't offered for the purpose you are talking about.

MR. HILL: Okay. I do not see any relevancy at this point on the jurisdiction question. I will try not to continue my objection as long as a continuing objection is noted on both of the jurisdiction and other grounds previously noted.

THE COURT: All right.

BY MR. KAIRYS:

Q What did you find, Mr. Ginaven?

A On January 18, 1973, I called Time Magazine in New York City to inquire about the cost of placing an ad. I talked with Miss Roma in Advertising Sales, described the purpose of the ad. She mentioned that the New York [7] Metropolitan addition or the supplements of it do not reach Fort Dix, and, therefore, I would have to use the Time Eastern addition. It has a circulation of a hundred seventy-one thousand nine hundred and eight in New Jersey. No data for Burlington County or Fort Dix in particular. She said that a full page ad costs $12,125 black and white or $18,790 in color. [8] Q Does that include a cost for preparing an ad?

A No. That's just placement. The preparation would be above and beyond that.

Q Okay. Who else did you call?

A I called—on the same day I called WFIL radio in Philadelphia. I talked with Jim Wilson there, in Radio Sales, explained the purpose of the ad, again in reaching G.I.'s with information about discharges. He indicated that lots of G.I.'s listen to this station. They do reach Fort Dix. He had no solid estimate on the

number of listeners there. He suggested that the best way to reach them would be with a packet of ads. You need more than one, one minute spot to get your message across. He indicated their standard package they announce per week for, you know, regular advertisers, would be twelve-sixty second announcements which would cost $1,116 a week. I asked him about the possibility of a three to five minute spot, perhaps ten minutes, in order to read the booklet on the air, and he indicated they do not allow ads of that size. Sixty second is the largest.

Q Now, when you say "read the booklet," you mean to read the entire contents of the booklet that you tried to hand out at Fort Dix?

[9] A That's correct, yes.

Q And that booklet concerns G.I. rights, the rights of G.I.'s, of people in the military?

A Right. That's one of the booklets we were passing out, yes.

Q Right. Now, with a sixty-second spot, you could perhaps advertise the availability of this booklet but not put in the contents of it?

A That's correct, except that it would then take the G.I. some action in order to get the booklet itself.

Q He would have to do something in response to the ad—

A That's right.

Q —to get it? Okay. Have you had any experience with that kind of ad, where you just put on a spot and talk about the availability of something?

MR. HILL: I have an objection, your Honor. I don't know what relevancy his experience is, whether or not he's competent to give an opinion in this area.

THE COURT: I'll allow. Go ahead.

A We have—C.C.C.O. has—had several radio spots on WMMR, advertising the availability of [10] our counseling services.

Q WMMR is a station in Philadelphia?

A Philadelphia, right.

Q And what's been the response?

A The ads ran, I believe, over a week and a half, period, and there were probably over a dozen spots, although I don't know the count for sure. We've had one or two phone calls in response to that.

Q Now, on the day you were at Fort Dix and you were picked up by the military, you did get to hand out some of your booklets; didn't you?

A Yes.

Q And roughly, what proportion of the soldiers that you offered the booklet to took it?

A Well, I'd say most of them took it. I'd say roughly, you know, three-quarters of the number of people. We weren't there that long that, you know, we were picked up before we handed out very many.

Q Okay. Now, did you make any inquiries of any local civilian groups?

A Yes. I called the Burlington County Times and the Trenton Times. They both had very insignificant circulation on the base.

Q Okay. Now, did you consult with anyone [11] concerning how much preparation you would need in order to reach people? For instance, you mentioned one of the radio stations had said that one ad really wouldn't accomplish much of anything. You need a packet.

MR. HILL: I do have an objection to this question, Judge. My agreement was to permit hearsay testimony as to the cost of advertising. My agreement was not to permit hearsay testimony as to somebody's conception of how much advertising he has to sell before it becomes effective, and that's what this question seeks to elicit information as to.

THE COURT: I'll take it for what it is. Go ahead.

A On January 24 I received a return call from my January 18th attempt to reach the Gerald Stevens Advertising Company in Philadelphia. Mr. Steve Horn called me back. He's president of the Advertising Agency. I explained the purpose of the advertising, to reach G.I.'s with information about their rights, asked him about the effectiveness of advertising. He said that there are no real accurate statistics on returns for ads on radio or [12] t.v. spots. It depends on the type of ad and the

response you were trying to get from it. He did say that a rule of thumb was about one per cent return on ads.

[13] Q Did he make any other suggestions to you?

A Yeah. He did say—I mentioned that we were trying to reach a large number of G.I.'s, that if we were leafletting. We could, you know, actually hand the booklets out. We wanted to reach a large number to get them with the same information. He indicated that we would probably need a campaign, an ad campaign of a combination of radio, t.v. spots, ads in a diverse number of magazines, such as a Playboy or Time Magazine or Sports Illustrated, he mentioned, plus a direct mail to a G.I.'s on Fort Dix. He estimated that if we got a copy of the complete mailing list for all the G.I.'s on the base, it would cost between $3500 to $4000 per thousand G.I.'s that we mail to.

I did try to get a copy of the mailing list and called Mrs. Kramer, talked to Mrs. Kramer in the Fort Dix Administrative Services. She informed me that the mailing list for the G.I.'s was not available to anyone.

MR. KAIRYS: Okay. I have nothing further on this witness.

THE COURT: Cross.

CROSS EXAMINATION
BY MR. HILL:

Q Mr. Ginaven, would you tell the Court, please, [14] exactly where you were distributing your leaflets, please?

A Yes. I was at the—just inside the gate at—I can't even remember the name of the town.

Q The Wrightstown entrance?

A Wrightstown, right. Excuse me.

Q And there is a sidewalk—isn't it true—that runs from Wrightstown into the Base?

A Right.

Q And you were either on that sidewalk or right adjacent to that sidewalk?

A I was on that sidewalk.

Q On the sidewalk?
A Yes.
Q And approximately how far from the entrance to the Base were you?
A It varied from, oh, I'd say, about a hundred yards to—right up to the Post, the gate Post there.
Q And you were distributing leaflets to people entering the base?
A Both entering and leaving.
Q And is there a sidewalk on just the one side of the road there?
A I believe so. I can't remember, to tell you the truth.
Q All right. So you could have accomplished your [15] purpose of handing out leaflets whether you were inside the base or just outside the Base in Wrightstown proper; couldn't you?
A I don't believe I could have. Most of the G.I.'s use a foot path that's worn across the grass and avoid going through the gates.
Q Well, you could have stood just outside that foot path and approached those G.I.'s; couldn't you?
A Yes.
Q And accomplished your purpose by disseminating information to them; couldn't you?
A I don't believe that is the best location for accomplishing our purposes, no. I believe further on the Base near the cafeteria perhaps would be better.
Q But you weren't near the cafeteria were you?
A No.
Q You were right near the Wrightstown entrance?
A That's correct.
Q Okay. Now, the Trentonian, the Trenton Times and the Burlington County Times are all distributed on Fort Dix; aren't they?
A Somewhat, yes.
Q Okay. Did you contact any local radio stations? By local radio stations I mean either Trenton radio [16] stations or Burlington County Radio stations.
A No, I didn't. I called WCAM, which is in Camden, but they don't reach Fort Dix.

Q So you have no idea what their rates are on these locations?
A No. No, I don't.
Q You gave some direct testimony with respect to response to advertising. What kind of response were you looking for?
A We were looking for—if we were advertising the booklets on discharges, we would look for direct orders for these six free booklets.
Q You don't know, do you, why people didn't respond to your advertising?
THE COURT: I don't think he said that they hired any.
MR. HILL: No, respond to advertising.
THE COURT: You mean to the leaflets that he did distribute?
MR. HILL: No. He testified on direct examination—if my recollection is correct, your Honor—that on several advertising programs that he's done by radio, I believe—
THE WITNESS. Some spots on WMMR.
MR. HILL: —some spots on radio that [17] he had very minimal response to that advertising. Isn't that correct?
THE WITNESS: Yes.
THE COURT: Could you estimate the percentage?
THE WITNESS: No. I don't know the number of listeners.
THE COURT: No way you could tell that?
THE WITNESS: No.

BY MR. HILL:

Q And the question is you don't know why you didn't get a response; do you?
A No.
[18] Q I mean, it's perfectly—it's just a possibility that many people were reached and just didn't care to respond as that or as if nobody was reached at all; isn't that true?
A I don't know. I don't know, you know, I don't have any information on the—on surveys of advertising.

Q Right. So the fact that you didn't get a response to this minimal radio advertising doesn't say anything about the liability of that particular media; does it?

A I wouldn't say it doesn't say anything, but isn't—

Q People that you reach just might not agree with your point of view; isn't that true?

A They might not, yes.

Q And might not respond for that reason; correct?

A Might not, yes.

Q Did you make any effort to contact a magazine called the Fort Dix Post?

A Yes, I called.

Q And what information did you receive from the Fort Dix Post?

A I was told—you know, I explained the ad [19] and I was told that you needed prior approval by the public information office for an ad in the Fort Dix Post.

Q Who told you that?

A Doris Waltz in Sales Advertising.

Q And the Fort Dix Post is not a military paper; is it?

A Mrs. Waltz told me that it was printed for the army, that's why—

Q Let me ask you the question again and maybe more precise: Is the Fort Dix Post published by the Department of Defense or any of its organs?

A No, it isn't.

Q It's a private publishing company—

A Yes.

Q —isn't it? And the person who told you that the matter must be approved by the Post Information Office is a civilian that has no connection with the Government; isn't that true?

A I believe so, yes.

Q Has no connection to any of these defendants in this case?

A I believe so.

Q Can't speak for any of the defendants in this case; right?

[20] A I believe so.

MR. HILL: Thank you.

THE COURT: Anything else?

MR. KAIRYS: Just very brief.

REDIRECT EXAMINATION:
BY MR. KAIRYS:

Q She told you the Fort Dix Post wasn't owned by the military but it was censored by the military?

A Well, she said I had to get prior approval from the public information.

THE COURT: That was pretty clear from the last hearing—wasn't it?—that that was the status.

MR. HILL: I don't think so, your Honor. We are now talking about a hearsay statement by this witness with respect to what a civilian not employed by the Government told him with respect to publication by a private newspaper.

THE COURT: All right.

MR. HILL: I think all the hearsay testimony I would request that it be stricken.

THE COURT: I'll let it stay.

BY MR. KAIRYS:

Q Now, just to repeat. I think there was [21] some confusion on your initial testimony about response to ads. The radio ad that you placed was in Philadelphia; right? It wasn't in Fort Dix, first of all.

A It was a Philadelphia radio station, yes.

MR. HILL: I ask that counsel for the plaintiff not lead his own witness, please.

Q And would you repeat again your response when you were personally on the post and able to hand people this booklet?

A I'd say most of the people I approached took a copy of the booklet or two. As far as a number goes, I'd say, you know, at least three-quarters of the number of people.

MR. KAIRYS: Thank you. Nothing further, your Honor.

THE COURT: All right. You may step down, sir.

(Witness excused.)

[22] MR. KAIRYS: I call John Landau.

MR. HILL: What was the name of this witness, please?

MR. KAIRYS: John Landau.

JOHN LANDAU, called as a witness on behalf of the plaintiffs being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. KAIRYS:

Q Mr. Landau, where do you work?
A I work at CCCO in Philadelphia.
Q What's your position?
A I'm the staff attorney of CCCO.
Q And what courts are you a member of the bar?
A I'm a member of the bar of New York.
Q Okay. Did you make some calls similar to the ones that Mr. Ginaven has just talked about?
A Yes, that's right.
Q Would you tell the court what you found out, please?
A Yes. I spoke with two people similar to the conversations that John Ginaven was having. I spoke with the Army Times in Washington, D.C. and with a local t.v. station, WCAU, in Philadelphia. For the Army Times I spoke with Jim Wilmot who's an advertising salesman there. I called him, and he responded, called [23] me back shortly thereafter. This was on the 18th of January. Mr. Wilmot indicated that the cheapest possible way of reaching GI's at Fort Dix through his paper would be to advertise in the Army Times solely in the United States. He indicated that I could do this at a rate of $1900 per page. They have a circulation of a hundred and thirty-five thousand throughout the United States, but he couldn't break that down by Base.

I went on to describe the probable content of my ads. I indicated that we had G.I. rights, booklets and information about discharges that we were trying to reach the G.I.'s with. And he responded that in that case there was some question as to whether I would be able to get those into the Army Times. He stated that I would have to—

MR. HILL: Your Honor, I object to this hearsay testimony on that grounds, as to whether he would be able to get things into the Army Times.

THE COURT: I will allow it.

A He indicated that I would have to submit the material to the—to an editorial board of the Army Times, and that they would rule on whether or not I could get it in there.

I went on and explained the size of the [24] booklet and asked them about the possibility of presenting our entire booklet in the Times. We were trying to present six free booklets to the G.I.'s, none of which could be produced, or at least could reasonably be produced in the Army Times, in, say, less than a page, so that the total—the total cost of presenting the booklets in the Army Times, the six booklets, would be six times nineteen hundred dollars or eleven thousand four hundred dollars.

I then spoke with WCAU t.v. in Philadelphia. There I spoke with Mr. Miller Parker, who's an advertising salesman there. I didn't actually reach him until the 27th of January. I explained—Well, first of all, he explained briefly to me that it was very difficult to give prices on advertisements because it depended very much on the individual t.v. show, but he says that roughly a 60 second advertisement on his network would cost $2600 to $3200. Again, I went on to explain our purpose, to try and reach G.I.'s at Fort Dix with the content of the booklets. He responded they had a listening audience of nine hundred sixty-eight thousand, he said was an average at night but he had no idea as to how many of those people were at Fort Dix. But he did say that if I wanted to reach a substantial number of G.I.'s with my information, [25] I would have to do a series of advertisements on t.v., what he described as kind of a saturation campaign. He suggested that I present my ads over the

course of three to five weeks, that for this period he could give me seven to ten spots per week, and that the cost of this campaign would be somewhere in the area of thirty-five to fifty thousand dollars.

I then went on to ask if there was a possibility of a ten minute spot on the t.v. show. He simply had no experience with that. He doubted that I could get that because it would break up their individual programming that was already scheduled.

Q That would be ten minutes to read the contents of one of the booklets?

A That's right. That's what I was intending.

Q Now, you've also brought with you today some figures on the value and the cost in money terms of CCCO's campaign to having G.I.'s informed of their rights; have you not?

A Yes, I have.

Q Could you give those figures, please.

MR. HILL: Just a second, your Honor. I do have an objection. If he's got some specific bills, you know, when he's expended money, that may be one thing. I'd examine those one at a time. Just a general statement [26] as to this man's opinion as to the value and cost of a committee's time I think is of no relevance. I don't think—I'm not sure that there has been any foundation laid to establish that this witness is competent to testify with respect to this. I don't think there has been any evidence laid to show that this witness is a representative or a duly authorized representative of CCCO—

THE COURT: Staff attorney.

MR. HILL: I'm not sure that he's been duly authorized by whoever runs that organization.

THE COURT: He has said so.

MR. HILL: And even if he has been authorized by that organization, that organization is not a party to this lawsuit and their costs should not play a factor in this lawsuit. They are not a plaintiff.

THE COURT: What kind of information are you looking for?

MR. KAIRYS: Your Honor, I should point out at this point the Third Circuit in talking about this issue of jurisdiction said it's not so much of the extent of infringement [27] of the right that we should measure, but the value of, for instance, the campaign that the candidates have; and we're going to produce some evidence of the value of that campaign. In connection with that I'm introducing with this witness the value of the campaign to inform G.I.'s of their rights. It's not a presidential campaign but it's an overall effort.

THE COURT: What is it, the cost of the CCCO for a certain period of time running it?

MR. KAIRYS: Yes, and he's going to estimate much of it is devoted to getting estimates for G.I.'s. I can lay some foundation—

MR. HILL: I would just like to make one more statement, your Honor. Again, it stems from the fact that the CCCO is not a party to this lawsuit. We are dealing with about four individual pamphleteers with respect to this individual issue, I gather. In so far as this Court should be concerned is only distributing leaflets for values that they individuallly believe, not because of their [27] affiliation, we are not dealing with CCCO's rights to make a description.

THE COURT: Objection's overruled. Go ahead.

BY MR. KAIRYS:

Q Mr. Landau, are you authorized by CCCO to present these figures from their official budget from the organization?

A Yes, I am.

Q Could you present them, please?

A Specifically on the booklet, first of all, I guess. We received a grant to produce the booklet, and we've received eighteen thousand dollars in funds, and this money has gone simply to the production of booklets, production and distribution to local counseling centers for distribution to G.I.'s

In addition to this eighteen thousand, we have—I should say this eighteen thousand doesn't include the

salaries of individuals who actually wrote the booklets, which took a considerable amount of time.

Q What portion of your national budget does the organization estimate is devoted to a campaign to see that G.I.'s are informed of their rights with booklets such as this?

A Yes. We spoke about this. We couldn't get [29] this very exact at all. But we know that certainly more than half of our budget is devoted to presenting G.I.'s with opportunities to know what their G.I. rights are, and what their rights to discharges are. We estimated it was somewhere between two-thirds and three-quarters of our national budget. Our national budget is two hundred fifty-seven thousand dollars, so this comes out to a hundred and seventy-one thousand to a hundred ninety-two thousand seven hundred and fifty dollars to presenting this material to G.I.'s and G.I. rights in general.

MR. KAIRYS: Could these pictures be marked, please?

THE COURT: Mark them for identification.

MR. KAIRYS: I'm not sure what number we are up to from the last hearing. You want to start over?

THE CLERK: Start over.

MR. KAIRYS: It might be confusing.

THE COURT: Why don't we start with 1-A.

THE CLERK: Okay.

THE COURT: While he's doing that, might I ask, are either one of you gentlemen getting a transcript of this? I suppose you [30] are.

MR. HILL: I'm sure we will get a transcript at the appropriate time, maybe sooner than that.

THE CLERK: That's P-1A and P-2A for identification.

BY MR. KAIRYS:

Q Mr. Landau, I show you exhibits P-1A and P-2A. Can you identify these pictures?

A Yes. These are pictures of Mr. Don Misch and Mr. John Ginaven, both from CCCO. This is the actual day that they were—this is a picture of their actual distribution to G.I.'s at Fort Dix, the day they were picked up by military base.

Q You were there yourself?

A Yes, I was there. I was standing very close to the person taking the photographs.

THE COURT: Is that a faithful representation of what you saw on that particular day?

THE WITNESS: Yes, it is.

MR. KAIRYS: Can we show them to the Court and to the U.S. Attorney? Do you want to see them?

MR. HILL: I'll take them over to the [31] counsel table.

MR. KAIRYS: Sure.

MR. HILL: Mr. Kairys, are these pictures offered solely for showing the defendants Ginaven and Misch distributing leaflets on the day in August when they were taken off the base by the military people?

MR. KAIRYS: For that purpose, and also to show that this area is where they were distributing leaflets is open to the public and essentially part of the road right through Wrightstown.

MR. HILL: May I ask a couple of questions of the witness?

MR. KAIRYS: Maybe his Honor should look at the pictures first.

MR. HILL: They haven't been offered in evidence yet.

THE COURT: I'll look at them. Don't you trust me? They didn't enlarge pretty well.

MR. KAIRYS: No, pretty fuzzy.

THE COURT: Go ahead, Mr. Hill.

VOIR DIRE EXAMINATION
BY MR. HILL:

[32] Q Mr. Landau—is that how you pronounce?

A That's correct.

Q Will you show me which persons on this picture are Mr. Ginaven and Mr. Misch?

A Well, I don't know how I can describe it to the Court.

MR. HILL: I would ask if it's satisfactory with the Court that he circle the people with the pencil. I honestly can't tell—

THE COURT: Just point it out to me.

THE WITNESS: Mr. Ginaven is this gentleman here (Indicating) in what looks like a blue shirt. I guess the farthest from the camera.

MR. KAIRYS: You are on P-2 now?

THE WITNESS: I'm sorry. I'm on P-2A.

MR. HILL: Right.

THE WITNESS: Mr. Ginaven is standing closer to—well, farther away from the center of the base.

MR. KAIRYS: Would you show to his Honor where the base starts approximately?

THE WITNESS: The base starts very [33] close to the railroad tracks.

THE COURT: How far from the corner, would you say, estimate?

THE WITNESS: Perhaps I would estimate twenty-five yards.

THE COURT: Okay.

MR. KAIRYS: Right near where that railroad crossing sign is?

THE WITNESS: Yes.

BY MR. HILL:

Q You pointed out Mr. Ginaven—

A Yes.

Q —in P-2A. Where is Mr. Misch?

A Mr. Misch is standing right here (Indicating).

Q The gentleman in the white shirt that's in foreground?

A Yes.

Q And with respect to P-2A, the sidewalk that Mr. Ginaven is standing on leads directly into Wrightstown?

A That's correct.

Q And this is where—is he in the process of distributing a leaflet when you took P-2A or when P-2A was taken?

A When P-2A was taken, he was offering a booklet.

Q And where were you?

[34] A I was standing, again, closer to the center of the base, right next to the photographer.

Q There are two gates at the entrance, at the Wrightstown entrance; aren't there?

A This particular Wrightstown entrance?

Q Yes.

A There are no gates. There are a couple of—sort of brick mounds, as I remember, standing out away from the road.

Q This picture doesn't disclose that; does it?

A The bricks, I guess, are away from the road. Do you see from here?

Q Isn't it true that there were also signs indicating that you were entering Fort Dix at this point?

A I believe there is a sign saying "welcome to Fort Dix."

Q There is a sign here that says "welcome to Fort Dix?"

A That's what I remember.

Q Isn't there a sign that says that this base is patroled by military police?

A There may be. I simply don't remember.

Q And if there was, this picture certainly doesn't show it, does it?

A That's true.

[35] THE COURT: They had a sign saying "Welcome, Fort Dix?"

THE WITNESS: Yes, there is.

THE COURT: And you believe them; right?

MR. HILL: I object to the admission of these on the grounds that they are not representative or do not accurately depict the entrance to Fort Dix at this point. I have no objection to their admission in so far as they depict Ginaven and Misch distributing booklets.

THE COURT: Obviously it doesn't show. For what it does show, I'll admit them.

MR. KAIRYS: We will offer other pictures that show some of the others that show "visitors are welcome", some other signs as you come into the base. If that's

what you rather have. This is not offered for that purpose.

THE COURT: How many pictures do you have?

MR. KAIRYS: There are about—

THE COURT: Mark them.

MR. KAIRYS: All right.

THE COURT: No. I was just telling [36] the clerk to mark them.

MR. KAIRYS: It's about ten more.

THE COURT: Why don't we do this: Show them to Mr. Hill. We will take five minutes. Show them to Mr. Hill. Maybe he can agree on this. Show him for what purpose. I'll mark them for identification, and go over them yourselves. In the meantime, I have another matter to take care of.

THE CLERK: P-1A and 2A in evidence.

(Recess.)

(Exhibits P-3A to P-17A received and marked for identification during recess period.)

[37] MR. KAIRYS: Mr. Landau, please take the stand, please.

JOHN LANDAU, resumed.

DIRECT EXAMINATION (continued)
BY MR. KAIRYS:

Q Okay, Mr. Landau, I am now going to present you Plaintiffs Exhibits 3-A through 11-A, and I'd like you to take them one at a time, read the number on the back, and explain if it accurately depicts what you saw. I believe you were there on the day.

Explain that, when these were taken and if you were at each one of these places. But explain that to each one. Okay. We'll start with 3-A.

A I was with the photographer on November 21, 1972, when—mostly in the morning—when all of these photographs were taken.

This first photograph is taken from the main—the main shopping center at Fort Dix, the one with the name PX,

and it accurately depicts what I saw, which is picture across the parking lot of the shopping center, the bowling alley across with a couple of what appeared to be civilians in the parking lot.

Q Okay. And 4-A?

A 4-A is an accurate depiction of a photograph [38] that I was actually in. I was—this is a picture of myself and some other—again, what appeared to be civilians buying pretzels at a soft pretzel stand. Again, this was at the rear of the main shopping center at Fort Dix.

Q On 3-A, do these cars that are in the forefront have any military identification or do they appear to be civilian cars?

A The cars that I saw, these cars in the forefront, had no military stickers that I could see.

Q Okay. Now, 5-A.

A 5-A. This is again a picture at the main post shopping center. This is a picture—this is an accurate depiction of, again, in the rear of the shopping center, a laundry truck and some shoppers walking by.

Q 6-A.

A This is again an accurate depiction of what we saw that morning. This is a picture of traffic entering and leaving Fort Dix on New Jersey Route 68, most of the traffic appearing to be civilian.

Q 7-A.

A This again is a picture at one of the entrances to Fort Dix. This is an accurate depiction of what I saw. It's a picture of the entrance where [39] Route—New Jersey Route 68 enters Fort Dix. There is a sign saying "Visitors Welcome" right at the entranceway.

Q 8-A.

A 8-A. Again, an accurate depiction of what I saw that morning. This is a picture as we were driving into Fort Dix on New Jersey State Highway Route 68. This is a picture of a Trailways charter bus driving through on Route 68 ahead of us.

Q 9-A.

A Again, an accurate depiction of what we saw. This is a picture of the Route 68 at the circle as you come into Fort Dix from Route 68. This is a picture of the road to

the right of Route 68 and some business and civilian traffic on that road.

Q Okay. 10-A.

A This is a picture of a—the church parking lot—one of the church parking lots at Fort Dix. There is a sign for visitor parking in the foreground of the picture. Again, an accurate depiction of what we saw.

Q And 11.

A Finally, this is again an accurate depiction of what we saw across the street from the church. A sign for a brigade headquarters with a lower sign [40] saying "Visitor Information," and a business truck passing.

MR. HILL: Judge, would you like to look at these first. I have a few questions on the pictures.

THE COURT: Go ahead.

VOIR DIRE EXAMINATION
BY MR. HILL:

Q Mr. Landau, what date were these pictures taken again?

A November—let me—the pictures were taken on November 21, 1972.

Q Were you present when the pictures were taken?

A Yes, I was.

Q With respect to when every one of these pictures were taken?

A Yes, I was.

Q Directing your attention to photographs 5-A, 6-A and 7-A, those photographs don't depict all the signs that were present when you entered that Fort; do they?

A Again, I'm not certain. There certainly may be more signs.

MR. KAIRYS: Would you explain the question? Not all of them are entrances. [41] There's one that's an exit. One of them looks like a shopping center.

MR. HILL: Excuse me. This is the wrong picture. I'm referring to 7-A, 6-A—

BY MR. HILL:

Q I believe they are the only pictures with respect to this Route 68 entrance. Right?

A I guess, yeah.

Q Aren't there other signs present at that entrance that are not depicted in the picture? For instance, isn't there a sign that says "All vehicles entering are subject to search?"

A I don't remember that sign. It may in fact be there. I don't remember.

Q Isn't there a sign at the Route 68 entrance which says that roads are patroled by military police?

MR. KAIRYS: I object, your Honor. He says he didn't know any other signs. If there were other signs, let him bring in a witness and tell us about it. We are not disputing—

THE COURT: He says there could be.

MR. HILL: Your Honor, I have an objection generally to all these exhibits on two grounds: One, particularly with [42] respect to Route 68 entrance. I object on the grounds that it's not truly representative of the entrance. With respect to the other pictures, I know of no relevance of these pictures to this litigation whatsoever.

THE COURT: All right. Overruled. Mark them in.

THE CLERK: 3-A to 11-A in evidence.

MR. KAIRYS: You can step down.

THE COURT: Do you have any cross?

MR. HILL: Yes.

MR. KAIRYS: Oh, you have more cross.

MR. HILL: I haven't had any cross so far.

CROSS EXAMINATION
BY MR. HILL:

Q Would you tell me the type of organization for whom you are a staff attorney?

A CCCO, an agency for military and draft counseling.

Q What does CCCO stand for?
A We were founded in 1948 as the Central Committee for Conscientious Objectors.
Q And you work in the Philadelphia office?
[42a] A That's correct.
Q And how many offices does CCCO have?
A We have five offices.
Q And where are they located?
A We have an office in Philadelphia, San Francisco, Chicago, Denver and Atlanta.
Q You testified to a certain budget for CCCO; is that correct?
A That's correct.
Q And you testified that approximately two-thirds of that budget was for the purpose of distributing material to military personnel?
A For the purpose—for the purpose of well, providing GI's with information about rights and discharges.
Q All right. And that budget is the national budget and that's the national percentage or costs informing GI's of their rights; correct?
A That's correct.
Q And can you tell me how many military bases you attempt to provide information to throughout the country?
A Well, we are, of course, trying to reach all military bases. We—you mean how many have we actually made major efforts on? Actually, very few.
[43] Q In other words, your testimony is that you are trying to reach soldiers on all military bases throughout the country and abroad?
A Eventually we would hope to do that with our material, yes.
Q Right. So that the budget of two hundred and some thousand dollars is not directed towards your Fort Dix campaign but is directed to all military bases; correct?
A That's correct.
Q How long have you worked for CCCO?
A A little less than two years.

Q Can you tell me how many times you worked for Mr.—withdraw it. You work with Mr. Ginaven; correct?
A I work—
Q With Mr. Ginaven?
A Yes, I do.
Q Can you tell me how many times Mr. Ginaven to your knowledge went to Fort Dix to distribute leaflets in connection with this work of the CCCO?
A The only time he went he was barred.
Q Just this one time?
A Yes. He's been unable to go back.
Q Right. And he never went before then; right?
[44] A No.
Q Did you distribute any leaflets on the day Mr. Ginaven was barred?
A No. I went for the purpose of serving as legal counsel.
Q Did you have more than Mr. Ginaven and Misch at Fort Dix on that day which was in August, 1972?
A There was one other person from the office in Wrightstown that day, yes.
Q Was that person distributing leaflets?
A No. He was—he was—he had simply driven us on the base. He may have—I believe he did distribute some leaflets in town that day, but—
Q In town that day?
A Yeah.
Q In Wrightstown?
A Yes.
Q And there are a large number of soldiers that come to Wrightstown; isn't that correct?
A Only—my experience has been only a handful when you look at the total number of GI's on Fort Dix.
Q Do you have a branch office in Wrightstown?
A No, we don't.
[45] Q You don't have a store front there?
A No.
Q Have you ever considered that?
A Yes, we have.

Q Did any representatives of your organization attempt to distribute leaflets in Wrightstown prior to the time when Mr. Ginaven and Mr. Misch were barred?
A There had been people there—
Q People from your organization distributing leaflets?
A Not to my knowledge.
Q So we are talking about a one shot effort by your organization to distribute leaflets through the effort of Mr. Ginaven and Mr. Misch; is that correct?
A At Fort Dix.
Q At Fort Dix, right.
MR. HILL: No further questions.
MR. KAIRYS: You may step down.
THE COURT: You may step down. Thank you, sir. You may step down.

(Witness excused.)

[46] MR. KAIRYS: May we continue, your Honor?
THE COURT: You may.
MR. KAIRYS: Mr. Seigle.

LARRY SEIGLE, called as a witness on behalf of the plaintiffs, being first duly affirmed, testified as follows:

MR. HILL: Your Honor, I have an initial objection to any testimony by this witness. Let me state the grounds for that. On September 8th, 1972 Interrogatories were filed in this matter.

Question 3 of those Interrogatories stated: "State the names and address of all persons having knowledge of facts relative to this litigation"—standard question in interrogatories.

Mr. Seigle's name is not disclosed in Answers to Interrogatories, and I object to any testimony on his behalf.

THE COURT: I'll allow it and look into the matter.

MR. KAIRYS: Your Honor, that was answered specifically that there were many people who had knowledge of the incident that [47] took place as a result of the preliminary injunction, and I said specifically that I'm not putting it down so that they have access to people as well as I do.

MR. HILL: That was not said, your Honor.

THE COURT: All right. Let's go.

DIRECT EXAMINATION
BY MR. KAIRYS:

Q What's your position now, Mr. Seigle? Where do you live?
A I work for the Militant Newspaper.
Q And up to—
THE COURT: Which newspaper?
THE WITNESS: The Militant.
THE COURT: The Militant. Would you keep your voice up, please.
Q Up to the election, what was your position?
A I was the national campaign manager for the Socialist Workers Party.
Q Okay. Now, in that capacity, could you tell his Honor, please, the cost or the value, the amount of money that was spent on the campaign of the Socialist Workers Party candidates for president and vice president?
A The National—
[48] MR. HILL: Your Honor, I have a continuing objection to the testimony.
THE COURT: Overruled. Go ahead.
A The National Campaign Committee spent approximately one hundred ninety thousand dollars in the course of the campaign.
Q Do you know what the president's salary is?
A I'm not sure. I believe it's—
MR. HILL: It's a matter of record, I would think.
THE COURT: It's a little more than mine.
MR. KAIRYS: I believe it's approximately a hundred fifty or two hundred thousand. I am not sure.
MR. HILL: Your Honor, for the record, may I ask what this line of questioning is directed toward? Is this a jurisdiction question?
MR. KAIRYS: Yes.
The Court again said it's not the extent of the infringement, but the value of the campaign that the infringement hindered.
THE COURT: I read the opinion several times.
[49] MR. KAIRYS: Okay.

Q All right. Now, did your supervisor have a part in supervising the distribution of leaflets on Fort Dix to announce the rally that took place as a result of this Court Order?

A Yes, I did.

Q Okay. How many leaflets were distributed to soldiers on the base?

A Almost ten thousand.

Q And what was the reception that the distributors got from the soldiers?

MR. HILL: Your Honor, I object to that question. He clearly is uncompetent to testify as to the reception.

THE COURT: It may go to the weight of it, but I'll allow it. Go ahead.

A The G.I.'s were pleased that Dr. Spock was going to be allowed to speak. Many of them have heard of him. Many have also heard of the other candidate. Many of them, even though they weren't supporting either of those candidates, thought it was a good idea to allow such a thing to take place. And general response was one of friendliness and greeting the rally with some enthusiasm.

THE COURT: How many attended?

THE WITNESS: There were about two [50] hundred people at the rally.

THE COURT: How many were from the outside?

THE WITNESS: Maybe sixty or seventy-five.

Q To your knowledge, was there any trouble during the time when leaflets were distributed between leafletors and any soldiers?

A No. There was no trouble.

Q And was there any trouble at the rally?

A None whatsoever.

Q Now, Mr. Seigle, I want to present you with Plaintiff's Exhibits 12A through 17A. Could you describe to the Court what this depicts and if they are an honest depiction, and describe your presence in any of these scenes.

MR. KAIRYS: You have no objection to these; is that right?

MR. HILL: I have no objection to those exhibits, your Honor.

THE COURT: Why don't you hand them to me?

MR. KAIRYS: Okay. These are all pictures of the rally, your Honor.

That first one, that's Judy Collins [51] singing to the group. A little bonus.

THE COURT: All right. Mark them. I have no inquiry on them.

MR. KAIRYS: Okay.

THE CLERK: 12A through 17A in evidence.

Q Now, Mr. Seigle, is the Socialist Workers Party still conducting campaigns now?

A Yes, we are. We're right now conducting a number of municipal campaigns, and we're preparing for statewide races next year.

Q And is it an on-going political party at this time?

A Yes, it is.

Q Okay. And what are the desires of the party with regard to Fort Dix?

If we are granted an injunction today, giving you the right to leaflet, what does the party intend to do?

MR. HILL: I have an objection. I don't know how this witness can know what the intentions of the party are at this time since he stated in his own testimony that he hasn't been affiliated with the party at least in leadership position since the election.

THE COURT: Campaign manager last [52] election. Are you taking part in this campaign?

THE WITNESS: Yes, I am.

THE COURT: In what capacity?

THE WITNESS: I am part of a committee that is managing those campaigns.

THE COURT: All right. I'll allow it.

A We would like to be able to do what we wanted to do all along, that is, to visit Fort Dix, to talk to the G.I.'s, to speak at meetings there, to pass out leaflets expressing the views of the part.

MR. KAIRYS: We have nothing further.

THE COURT: Cross.

CROSS EXAMINATION
BY MR. HILL:

Q Mr. Seigle, you personally attended the rally; didn't you?
A Yes, I did.
Q And you were present most of the time in the parking lot adjacent to the theater where the rally was held?
A Yes.
Q And how many soldiers did you say attended that rally?
[53] A I think there were some, were more than a hundred G.I.'s.
Q More than a hundred G.I.'s?
A Yes.
Q And those G.I.'s that were in uniform; were they not?
A No. I think most of the G.I.'s there were not in uniform.
Q Can you tell the Court how you know the people that were not in uniform were or were not G.I.'s?
A Well, generally, those who are G.I.'s have short-cropped hair and relatively clean shaven, and the other civilians there had more hair on their face.
Q There were, however, soldiers there in uniform; were there not?
A Yes, there were.
Q And how many soldiers in uniform did you see?
A Maybe thirty or forty.
Q Thirty or forty in uniform?
A I think so.
Q And these soldiers—I withdraw that. Your organization handed out at that rally various literature; did you not?
A Yes, we did.
Q And you handed out campaign placards; didn't you?
[54-55] A Yes.

Q And by "campaign placards," I mean placards that can be held in your hand and the people are supposed to hold at the time of the rally to show support?
A They can be held, yes.
Q And didn't people at the rally display those placards and show support for you by displaying at the rally?
A Some of the soldiers there who were supporters of the Socialist Workers Party did hold those signs.
Q In other words, they were soldiers in uniform holding those placards in support of your rally; isn't that correct?
A Yes.
Q And wasn't it also true that there were soldiers in uniform that had campaign buttons on their uniform?
A I'm not sure about that.
Q How long have you worked for the Militant?
A Since the November 7th elections.
Q Did you have any association with the Militant prior to that time?
A I wrote articles for it.
Q What is your association or—in what capacity have you associated with the Militant at this time?
A I'm a member of the editorial staff.
[56] Q Since you became a member of the editorial staff of the Militant, have you made any effort to have the Militant distributed on Fort Dix?
A No, I have not.
Q How long have you been knowledgeable with respect to the Militant's affairs?
A Well, could you be more specific?
Q How long have you been aware of the existence of the Militant?
A For about eight years, nine years.
Q How long have you known people that run the Militant in some sort of an executive capacity or decision making capacity?
A Several years.
Q To your knowledge, has the Militant ever made a request to have its newspaper sold at Fort Dix?
A Not to my knowledge.

Q And to your knowledge, the Militant, any request that it be sold has never been rejected by the command at Fort Dix; have they?

A Well, no such request has been made.

MR. HILL: thank you. That's all.

REDIRECT EXAMINATION
BY MR. KAIRYS:

Q You did or your candidates made a request to [57] come to Fort Dix; did they not, to speak?

A Yes.

Q And what happened to that request?

A It was refused.

Q And didn't they also ask to distribute literature on their behalf when they wanted to come to Fort Dix?

A Yes, they did.

Q And what happened to that request?

A It was refused.

MR. KAIRYS: Nothing further.

THE COURT: Thank you. You may step down.

(Witness excused.)

[58] MR. KAIRYS: This will be our last witness, your Honor. Alan Hardy.

ALAN EADS HARDY, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. KAIRYS:

Q Mr. Hardy, you are a plaintiff in this suit, are you not?

A That's correct.

Q Where do you work now?

A I work for the Bach Mai Fund Resource Center.

Q What is that?

A It's a part of the national campaign by the medical aid for Indo-China to raise three million dollars to replace the Bach Mai Hospital in Hanoi that was

destroyed during the December 19 and 22 bombings on that city.

Q That's this past December?

A This past December, 1972.

Q Are you also still working for Philadelphia Resistance as you were when the suit was filed?

A I'm still associated with Resistance, yes.

Q And is this work for the Bach Mai Hospital part of your Resistance work also?

A It complements the Resistance work.

[59] Q Now, as a staff member of Resistance, could you estimate for the Court the value in money terms of Philadelphia's Resistance Campaign to end the war?

MR. HILL: Your Honor, I would like to note my objection to this line of questioning.

THE COURT: All right. Overruled. We understand you position.

A Philadelphia Resistance spends approximately twenty-five thousand dollars a year as its total budget. I can't estimate the exact percentages which would be devoted to military work, but working with the military and particularly with Fort Dix and McGuire Air Force Base has been a significant part of our work for the full time that Resistance has existed, which has been the past six years.

Q And is all of it devoted to anti-war work of some form?

A Most of it, yes.

Q Okay. If you are granted an injunction today, or whenever the Court might resolve this case, what would intend to do? Would you go back to the Base?

A Yes, I would, for several reasons: One purpose would be to attempt to reach the G.I.'s with the present information about the Bach Mai Hospital and our fund [60] raising campaign. In working with the Vietnam Veterans against the war, and with a number of active duty G.I.'s. I've come into contact with in my work with Resistance, I found a significant amount of sympathetic response to information concerning destruction that has happened as a result of the U.S. participation in the war in Indo-China.

I would also go back as a part of the continuing effort by Resistance to reach servicemen with information concerning discharges, conscientious objection and other means by which servicemen can be informed of their rights and can exert their legal rights in relating to the Armed Forces.

Q And how about the war?

A Well, it's the position of Resistance and my own personal position that the issue of the war in Indo-China is not a dead issue. The war has reached a stage of truth, but there is no peace treaty. There is no certainty in my mind that the United States is out of there for good. There are troops in both Thailand and the Gulf of Tonkin which could be easily re-introduced into some active role there, so anti-war activity among G.I.'s is still, in my opinion, and in the opinion of Resistance, an important aspect of our work in something that we would need to continue.

[61] MR. KAIRYS: Cross examine.

CROSS EXAMINATION
BY MR. HILL:

Q How long have you been associated with the Philadelphia—is it the Philadelphia Resistance Committee?

A It's Philadelphia Resistance.

Q How long have you been affiliated with that organization?

A For slightly over four years, about four and a half years.

Q Does that committee have a store front or an office in Wrightstown?

A Resistance has not itself had a store front. However, we have participated as part of this staff with other groups that have maintained store front and offices in Wrightstown, yes.

Q Now, what was the date that you were barred from distributing literature at Fort Dix?

A February 25, 1972.

Q Was that the first time you distributed literature on the Post?

A No, it was not.

Q How many other times have you distributed literature?

[62] A I believe only one other time that I had—I personally had distributed literature on the Post?

Q Yes. And when was that?

A In October of 1971.

Q Subsequent to your being issued a bar order by the personnel of Fort Dix, would you please tell the Court whether or not you went back to the military subsequent to that date and asked that the bar order be rescinded?

A I have not personally been back, but Mr. Kairys has been acting for me in attempting to get that bar order rescinded in this case.

Q Was the complaint that you filed in this litigation the first step that you took subsequent to your being barred to attempt to get back on the Fort to distribute leaflets?

A Yes.

MR. HILL: No further questions, your Honor.

MR. KAIRYS: That's all.

THE COURT: You may step down, sir.

(Witness excused.)

MR. KAIRYS: That's the Plaintiff's case, your Honor. We rest.

MR. HILL: Your Honor, at this point [63] in time the defendants have a motion pursuant to Rule 41 of the Federal Rules of Procedure for Judgment of Dismissal on the grounds that upon the facts that none of the plaintiffs have shown themselves that they are entitled to relief.

Now, would you prefer argument to be had at this time?

THE COURT. On jurisdictional grounds?

MR. HILL: Not only on jurisdictional grounds, but also on the merits of the case, on the defenses that have been presented in the Answer, on the grounds set forth

in our motion for dismissal. I can make a rather full argument—

THE COURT: Right now I'll take it under advisement. Proceed with your evidence and we will see what time we have left over.

MR. HILL: Very good. This is not without prejudice. This is—

THE COURT: Now, I understand, I am just reserving decision.

MR. HILL: All right. Fine.

[64] MR. HILL: At this time, your Honor, the defense will first call Colonel Vincent Olsen.

VINCENT IRVING OLSEN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. HILL:

Q Colonel, would you please state your rank to the Court?

A Colonel.

Q How many years have you been in the military?

A Twenty-eight plus six. Twenty-eight years and six months.

Q Are you currently stationed at Fort Dix?

A I am.

Q How long have you been stationed at Fort Dix?

A For a period of eighteen months.

Q What is your assignment at Fort Dix?

A I am the Provost Marshal.

Q Now, Colonel, I direct your attention to November 4, 1972, which was the date that Dr. Spock and several of the other candidates visited Fort Dix. Can you tell me where the rally was scheduled to be [65] held?

A Yes. The rally was scheduled to be held—that would be the east side of Theater V.

Q What were your responsibilities in connection with the rally?

A The maintenance of law and order, protection of Dr. Spock.

Q What day of the week was the rally scheduled for?

A A Saturday.

Q How were the hours set for the rally?

A I believe the hours were from 1:30 to 4:30 in the afternoon—four o'clock in the afternoon.

Q Were representatives of Dr. Spock present prior to 1:30?

A Yes.

Q And did you have people on duty prior to 1:30?

A Yes, I did.

Q On a normal Saturday, on any given shift, would you tell me how many M.P.'s you have on duty?

A Well, normally we would have between five to eight patrols, which would be sixteen people and four on the deck. It would run, average, between fourteen and sixteen people on assignment.

[66] Q And on a normal Saturday per shift, how many vehicles are employed by those fourteen to sixteen M.P.'s?

A Oh, seven to eight vehicles.

THE COURT: How many, sir?

THE WITNESS: Seven to eight, seven or eight. It depends on the number of personnel available.

Q Now, directing your attention to November 4, 1972, would you please tell me how many additional members of the Military Police were assigned to duty?

A Approximately sixty to sixty-five.

Q And what time did these additional personnel come on duty?

A Ten o'clock in the morning till about four-thirty in the afternoon.

Q Would you please the court a break-down as to how these men were assigned, these additional men were assigned?

A Yes. We had a stand-by force of, I believe it was, thirty-three enlisted men and two officers. We had one, two, three—three two-man patrols at each of the

main gates. There was also an escort vehicle. I had eight military police investigators present, too, CID agents, there was myself, my [67] operations officer, my driver, traffic escort officer, assistant operations officer, I had five, six MP's on traffic patrol. That was at the site of the rally and also at the main PX.

Q To your knowledge, other than additional military police forces, were there other military men assigned to duty on that Saturday who would not otherwise have been on duty Saturday?

A Yes. We had a stand-by ambulance with personnel. PIO was out. And then there were, oh, unit commanders of personnel involved. They were out also.

Q Would you explain to the Court what PIO means, please?

A Public Information Officer.

Q Would you tell the court how many additional vehicles were employed on that Saturday?

A I would say between eight and nine.

Q What kind of vehicles were these?

A Some were military police vehicles and—these are the vehicles that are marked. And we had some jeeps, and we also had unmarked military police vehicles that were used by the criminal investigators and also the military police investigators.

Q Your judgment was the assignment of the [68] additional military police officers reasonably necessary to enable you to perform your duties?

A Yes, sir.

Q Were you present at the parking lot adjacent to Theater V during the time of the rally?

A Yes, I was.

Q Did you observe the crowd at the rally?

A Yes, I did.

Q Can you tell me the size of the crowd?

A About approximately 150 people.

Q Where did the speakers speak from?

A They spoke from a flat bed, a flat bed truck.

Q Was a sound amplifiers system used?

A Yes.

Q Did you observe whether soldiers attended the rally?

A Yes, there were soldiers there.

Q Were there soldiers in uniform attending the rally?

A Yes.

Q Did you observe any soldiers wearing campaign buttons?

A No. That I don't recall. They may have been, but I don't recall. I believe—I'm a little [69] confused at whether it was this rally or other rallies, but I recall seeing campaign buttons. I can't recall at this specific one.

Q To your recollection were any representatives of the Judge Advocate General's Corps on duty when Dr. Spock came?

A Yes, there were.

Q How many? Do you recall?

A I know of two of them there that I personally know.

MR. HILL: I have no further questions of this witness.

[70] THE COURT: Cross.

CROSS EXAMINATION
BY MR. KAIRYS:

Q Did those sixty to sixty-five people—is that the right number?

A Approximately, yes.

Q Did they have to do anything in fact except sit there?

A Yes, sir. There was some directing traffic. There was escort vehicles to bring the people on the Post.

Q Did you bring Dr. Spock on the Post?

A Also the buses that arrived—there was a bus that arrived. We escorted them.

Q Well, sixty to sixty-five people weren't necessary for that?

A Thirty to thirty-five were in stand-by reserve.

Q Did you need them?

A Yes, sir.

Q In fact, did you need them?
A I mean—
THE COURT: Were they used, he wants to know.
THE WITNESS: They were not used, no, sir.
Q Was there any trouble?
A None that I recall.
[71] Q It was a pretty pleasant atmosphere; wasn't it?
A Well, it was cold out.
Q I am not referring to the temperature.
A As far as being pleasant, I don't think the M.P.'s liked working that day. It wasn't pleasant to them.
THE COURT: There were no disturbances; were there?
THE WITNESS: None whatsoever.
Q Okay. What other rallies would there have been that you might have seen campaign buttons at?
A Well, I used the term wrong. Rather than rallies, I should have said demonstrations.
Q I see.
MR. KAIRYS: Okay. We have nothing further.
MR. HILL: One further questions, Your Honor.

REDIRECT EXAMINATION
BY MR. HILL:

Q Colonel Olsen, you testified there was no trouble; is that correct?
A That's correct.
Q By that you mean there was no fights, no [72] violence?
A That is correct.
Q At the conclusion of the rally adjacent to Theater 5, where did Dr. Spock go at that time?
A Dr. Spock departed and went to the main PX area.
Q And what did he do at the main PX area?
A He attempted to get into the main PX.
Q Did he have campaign literature with him?
A Yes, he was carrying it.
Q Was he permitted to enter the main PX?
A No, he was not.

Q And why was he not permitted? Was he carded? Did he have a card, an identification card?
A He did not have an identification card and you are only authorized in there if you do have an identification card.
MR. HILL: No other questions.

RECROSS EXAMINATION
BY MR. KAIRYS:

Q Did you ask him if he intended to distribute anything?
A No, I didn't ask him his identity, but he was carrying campaign literature.
Q They had a bundle of literature that was used [73] at the rally?
A Yes, sir.
Q And then they went into the cafeteria; did they not?
A After the main PX they went into the cafeteria, yes.
Q With me?
A Yes. I was there.
Q Okay. I remember. And we had lunch?
A Yes.
Q And did he distribute anything in the cafeteria?
A I don't recall whether he did or not, but I do recall him talking to a young soldier who came up to Dr. Spock and interrupted him while he was eating, and I believe at that time Dr. Spock did hand campaign literature to that soldier.
Q Okay. That's not so, but—
A He handed him something. As he shook his hand, he handed him a paper.
Q The soldier came up to Dr. Spock?
A That is correct.
Q That cafeteria is open to the public. He has every right to eat there; doesn't he?
A Yes, definitely.
Q And it's on the Post?
[74] A That is correct.

MR. KAIRYS: Okay. Nothing further.
MR. HILL: That's all, Colonel.

(Witness excused.)

MR. HILL: Major Beattie.

DONALD G. BEATTIE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

BY MR. HILL:

Q Major, how long have you been in the military?
A Approximately sixteen years.
Q Where are you assigned?
A As the Deputy Provost Marshal at Fort Dix.
Q Were you so assigned on November 4, the date Dr. Spock came?
A Yes, I was.
Q And what are your responsibilities as the Deputy Provost Marshal?
A Well, I am primarily the administrative assistant to Colonel Olsen.
Q Major, did you have occasion to break down by rank the additional personnel that were utilized by the military police in conjunction with Dr. Spock's visit?
A Yes.
MR. HILL: Can I have this marked [75] for identification, please.
THE CLERK: D-1A marked for identification.
MR. KAIRYS: Let me see it, please.

BY MR. HILL:

Q Major, I show you defendant's Exhibit D-1A, and I ask you if you can identify this document and describe it to the Court, please.
A Yes. This is an DA 2496, which is a disposition from which essentially lists the people who were on other than normal duty on the day of Dr. Spock's visit to Fort Dix.

Q What's the total number of people you have listed there?
A Ten officers and forty-four enlisted men.
Q And are these persons broken down by rank?
A Yes, they are.
MR. HILL: I ask that this be admitted into evidence, your Honor.
THE COURT: Any objection?
MR. KAIRYS: Your Honor, we have been allowing this train of thought to go along. I assume that Mr. Hill is trying to show that there were extra people on duty. We'll stipulate to that. I don't think it has to go [76] much further.
THE COURT: We'll take it as long as he has it.
MR. KAIRYS: I have no objection. I don't think it proves anything relative to the case though.
THE CLERK: D-1A is marked in evidence.
MR. HILL: Your Honor, I have no further questions of this witness.
THE COURT: Any questions?
MR. KAIRYS: None.
THE COURT: Thank you, Major. You may step down.
THE COURT: Thank you.

(Witness excused.)

[77] MR. HILL: Defense counsel calls Jasper Williams.

JASPER WILLIAMS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. HILL:

Q Mr. Williams, by whom are you employed?
A The Department of the Army.
Q Where are you located?
A Fort Dix.

Q And what's your assignment at Fort Dix?
A I'm employed as Systems Accountant.
Q Does that involve cost accounting?
A Yes, it does.
MR. KAIRYS: We will stipulate that he can present his figures.
THE COURT: All right. Do you have some figures?
MR. HILL: Yes. May I have this marked for identification.
THE CLERK: D-2A for identification.
Q Mr. Williams, did you have occasion to compute the labor costs of the additional military police utilized in connection with Dr. Spock's visit?
A Yes, I did.
[78] Q And what was the basis of your computation of this cost?
A The basis was a schedule which is published by the Department of the Army listing the rank by rate and the daily rate.
Q I show you defendant's Exhibit 2A for identification and ask if you can identify it?
A Yes, this is the schedule that I used.
MR. HILL: Mr. Kairys has no objection, your Honor.
THE COURT: Mark it.

(D-2A marked in evidence.)

BY MR. HILL:

Q Mr. Williams, in computing this labor cost, how many hours did you allow for each person used?
A Six hours.
Q Six hours. Mr. Williams, I show you defendant's Exhibit D-1A in evidence and ask if you have seen that before?
A Yes, I have seen it.
Q Utilizing the information provided in Exhibit D-1A in evidence and D-2A in evidence, did you have occasion to compute the total labor cost for additional military personnel used in conjunction with Dr. Spock's visit?
[79] A Yes, I did.

Q Do you have that in written form or do you have it just in your head?
A I have it on paper, but it's really not valid for evidence because the actual computation is not shown, only the figures.
MR. HILL: Can I have this marked for identification, please.

(D-3A marked for identification.)

Q Mr. Williams, I show you an exhibit that's been marked D-3A for identification, and it appears, upon examining D-3A, that is exactly the same as D-1A in evidence except that you have made certain markings in pen on that form; is that true?
A That's true.
Q Would you please explain opposite the numerals 06 on D-3A in evidence?
A That's the manpower cost consumed during those six hours.
Q By whom?
A Dr. Spock.
Q Whose manpower?
A By the colonel. That's the colonel.
Q That's one colonel for six hours?
A Right.
[80] Q And you have similar figures after the figures 05, 04, 03, 02?
A Yes.
Q And those similarly constitute the manpower costs of these officers?
A Yes.
THE COURT: And so forth down through the ranks?
THE WITNESS: Yes.
THE COURT: All right. Do you object?
MR. KAIRYS: No.
THE COURT: Mark it.

BY MR. HILL:

Q Did you have occasion to total these?
A Yes.

Q What's the total cost?
A Eleven hundred forty-three dollars and fifty cents.
THE COURT: How much, sir?
THE WITNESS: $1,143.50.
MR. KAIRYS: They couldn't get jurisdiction, your Honor.

(Exhibit marked D-3A in evidence.)

MR. HILL: I have no further questions of this witness.

[81] CROSS EXAMINATION
BY MR. KAIRYS:

Q Does the Army pay over time?
A No, it does not.
Q So for instance, Colonel Olsen—I'm just making this up—if he made ten thousand dollars, he didn't get ten thousand plus a certain amount because he was there that day?
A (Shakes head.)
Q So it really didn't cost the Army anything?
A Yes, it did.
Q Why?
A Because the cost is based on the forty-hour work week.
Q But the Army did not pay out any extra money in salary to any of the—
A But still the cost is based on the forty hour work week.
Q I understand that. You've got an estimate of how much each hour of their work costs. The only real cost is perhaps they couldn't be doing something else that may be they might have done with that time, like going to a movie or something like that, since it was off hours. It wouldn't have been Army time, anyway, but you did not shell out extra money, for instance, to [82] Colonel Olsen because he was there that day?
A Well, I'm not involved in the distribution of pay. I simply compute the rates.

Q Well, did you give Colonel Olsen—what's the amount for him on that exhibit?
MR. KAIRYS: We might have some money owed to you.
Q You've got next to Colonel Olsen's name Seventy-two dollars and twenty-five cents. Was a check issued to him for that amount?
A No, it was not, but that is the amount costed to the Government by the visit of Dr. Spock. That cost had to be distributed somewhere.
Q But the out of pocket extra expense over usual salaries that would be paid anyway was nothing?
A If you are to look at it that way.
Q I do. Now, are you a cost analyst or analyst?
A No, a systems accountant.
Q You are a systems accountant. Did you do any kind of analysis of the breakdown they made to decide whether or not it was necessary to have that many people on duty?
A No, because that is not part of my job.
Q You didn't analyze that?
[83] MR. KAIRYS: Okay. I have nothing further.
THE COURT: Thank you, Mr. Williams.

(Witness excused.)

MR. HILL: Defendants call Richard Janes.

RICHARD O. JANES, Called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. HILL:

Q Mr. Janes, by whom are you employed?
A I'm employed by the Army and Air Force Exchange Service.
Q How long have you been employed by that service?
A Twenty-three years.
Q Would you tell the Court what that service is?

A It is the military exchange service which provides articles of convenience and necessity and services to the Armed Force of the United States.

Q What's your particular duty with the exchange service?

A At the present time I'm assigned as general manager of the Dix-McGuire Consolidated Exchange.

[84] Q Are you familiar with the manner in which the exchange service attains its newspapers and magazines for distribution?

A Yes, I am.

Q And would you please describe the procedure by which newspapers and magazines are procured?

A We, for the most part, our buying office will contract with a news distribution agency to provide paperback books, newspapers, magazines, for resale through our exchanges to our customers, to authorized customers.

Q Is it also possible in some instances to have direct delivery of newspapers to the homes of soldiers on the Post?

A Yes, this is permitted. If someone lives on Post and desires delivery of a periodical to their home, they may do so by contacting the circulation manager of this periodical.

Q Does the exchange service as a general basis specify the names of the newspapers and magazines that are purchased and distributed through the exchange service facility?

A No, we do not.

Q Is it the distributor that makes collection?

A Yes. We assign a certain amount of space in [85] a particular store, and then we permit that distributor then to use that space to display and sell magazines, newspapers and paperback books.

Q Does the exchange service censor any of the material that is offered for sale.

A We do not.

MR. HILL: May I have this marked for identification, please.

THE CLERK: D-4A for identification.

Q Mr. Janes, I show you D-4A for identification and ask you if you can identify this?

A This is an exchange service bulletin which relates to the procurement and sale of unsuitable and/or offensive material exchange.

Q Is that a true copy of the original bulletin that you received?

A Yes, it is.

Q Does that Bulletin permit you to censor any material that's offered for sale?

A It does not.

MR. HILL: I offer this into evidence.

MR. KAIRYS: No, no objection.

THE COURT: Mark it.

THE CLERK: D-4A marked in evidence.

Q Mr. Janes, if the publisher of a newspaper or a magazine, that wasn't currently being distributed on [86] Fort Dix, wanted that magazine or newspaper to be distributed on Fort Dix, how would you go about having it distributed?

A Well, he would have—his first choice would be to go to the news agency which had a contract with us and see whether or not they would be willing to purvey that magazine or periodical, whatever it was. If they were not interested and he felt that he wanted to sell this item to the exchange for resale to the customers, he would then have to go through our buying office and our exchange regional headquarters in Cameron Station, Virginia, and attempt to sell it to the buyer down there for that particular commodity.

Q How long have you been at Fort Dix?

A I've been at Fort Dix for approximately three years.

Q Since you have been in Fort Dix, have there been any inquiries from any magazines or newspapers that weren't being distributed on base with respect to being distributed?

A To the best of my memory, there is only one. I believe it was Overseas Weekly, which is a newspaper, and they had previously not published it in the United States, and they decided apparently to start publishing

in the United States. So they came to us and asked us how they [87] would go about it, and we indicated that they could go to our news agency, if he was willing to handle it, or if they wanted to go on national distribution or local distribution, depending, and their intent was to go national throughout the entire Country, so we recommended to our headquarters, Army and Air Force exchange in Dallas, Texas.

As a result of their inquiry, they retained a national contract to vend their paper through vending machines on Post, throughout the country and they also now distribute their paper through the news agency which is under contract.

Q Since you have been at Fort Dix, has there ever been an occasion when a newspaper went to the exchange service and asked that this particular newspaper be distributed, was there ever an occasion when it was turned down, a newspaper was turned down in its effort to be distributed on base?

A Not to my knowledge.

Q As general manager of the exchange service, have you ever prohibited the distribution of any newspaper or magazine because you didn't agree with the content?

A Absolutely not.

Q Since you have been at Fort Dix, has the command—by the "command" I mean General David or any [88] of his predecessors or any officers acting under him—told you not to sell any issue of any newspaper or magazine or not to distribute any item or literature?

A No.

Q Would you tell the Court what people are privileged or hold the privilege of buying at the Post Exchange?

A Well, the Post Exchange, as a nonproprietary agency of the Department of the Defense, its mission is to serve the Armed Force and their dependents.

So all of the activities which we have opposed are restricted to their use with the exception of food activities. Post exchanges which are military resale stores, service stations, concession and contracted services, such

as barber shops, and so on and so forth are specifically for the use of active duty military and their dependents and/or honorably retired personnel.

Now, the food activities, since there are no restaurant facilities on Post, the installation commander is authorized to allow visitors to the Post to use the food activities on Post which is the case at Fort Dix.

MR. HILL: No further questions.

[89] CROSS EXAMINATION
BY MR. KAIRYS:

Q You were shown this Defendant's Exhibit 4A and you said it doesn't contain any censorship, is that right?

A That's correct.

Q Would you read paragraph six?

MR. HILL: Your Honor, he didn't say it didn't contain any censorship.

MR. KAIRYS: Well, he said—

THE COURT: Let me hear it. It's in evidence.

A "Items which the installation commander officially determines to be unsuitable for sale in the exchange will be removed from sale. Positive action by AAFEF purchasing activities to discontinue procurement of such items."

Q Now, what does that sound like?

A That sounds like if the installation commander tells me to take something out of sale, I will do so.

Q "Unsuitable." What does that mean?

A I have no idea.

Q Are you telling me that any publication can be sold in the exchange of the Post or are you just setting out the usual procedures?

Let me give you an example to make that [90] more concrete. The Militant, which I think you just heard Mr. Seigle testified is a Socialist newspaper. It's very much against policies of the military right now. It's something very likely that the commander of the base would disagree with wholeheartedly—

MR. HILL: Your Honor, I object to that characterization.

Q Could we sell that on the base?
A As far as I know you could.
Q In the Post Exchange?
A I see no reason not to.
Q How about that regulation right there?

THE COURT: Well, I think you are arguing. What he has told me is he doesn't know how they do it, and he's never seen one turned down. I mean it's obvious to me from the previous hearing that this is contrary to the military mission, violation of those regulations; they probably would not.

MR. KAIRYS: Right. I was going to refer to earlier testimony on that. They already said they won't let it on the Base if they don't like the contents. I have nothing further.

MR. HILL: I just want to make one comment about that, the most recent characteriz- [91] ation. The only military regulation involves, say, that the military commander, after he submits the material to the Department of the Defense in Washington, can prohibit the distribution of the publication. If there is a finding that it presents a clear danger to the loyalty, discipline and morale of the soldiers, which is quite a specific test, there is no regulation, and there has never been any testimony in this case saying that an item cannot be distributed simply because the commanding officer doesn't like what it has to say.

As a matter of fact, regulation that have been presented heretofore to this court indicate that the personal preference of the commander doesn't make a difference, and even if it happens to criticize the United States.

THE COURT: All right. Are you done with this witness?

MR. HILL: Yes, I am, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Do you have anymore?

MR. HILL: Yes, your Honor. This will [92] involve putting in quite a number of photographs. Do you wish us to mark them?

THE COURT: Why don't you do that. We will pick up at 2 o'clock.

MR. HILL: Okay.

(Luncheon recess.)

(Defendant's exhibits D-5A through D-36A were marked for identification during the recess.)

[93] MR. HILL: Your Honor, the defendants call Louis Greco.

LOUIS J. GRECO, called as a witness on behalf of the defendants, being first duly sworn testified as follows:

MR. KAIRYS: Your Honor, we have looked through these pictures and we have no objection to them.

THE COURT: Do you need him at all?

MR. HILL: Yes. I just want to describe where some of the pictures were taken.

THE COURT: Okay.

DIRECT EXAMINATION
BY MR. HILL:

Q Captain, where are you stationed?
A At Fort Dix, New Jersey.
Q And you are a Captain in the United States Army?
A Yes, sir.
Q And you are a member of JAG?
A Judge Advocate's General Corps. That's correct.
Q Are you assigned to JAG at Fort Dix?
A Yes, sir, I am.
Q Did you cause a series of pictures to be taken essentially adjacent to the entrances of Fort Dix, New Jersey?
A Yes, I did.

[94] Q Were you present when the pictures were taken?
A Yes, I was.
Q When were the pictures taken?
A 20th of November, 1972.

Q Captain, I show you a series of pictures that have been marked 5A for identification through 15A for identification, and I would ask that you describe to the Court each picture as to where it was taken and generally what it depicts.

A Exhibit 5A for identification is a picture looking along Highway 68 from outside the main gate or one of the main gates to Fort Dix. It was taken approximately oh, 50 to 75 yards outside the Post and looking inward.

Q You can go one by one.

A Is that sufficient?

6A for identification is a road sign that's located on the right-hand sign posted to the view of incoming traffic on the right-hand side of Highway 68, approximately 50 yards inside that entranceway.

Q What's the general nature of that sign?

A Shall I read it?

Q Just generally, yes.

A Well, it says: "All vehicles are subject to search while on the Fort Dix military reservation." It [95] cites an Army regulation: "Soliciting prohibited unless approved by the commanding general" followed by the speed limit.

MR. KAIRYS: What number was that one?

THE WITNESS: That was 6A for identification.

A (Continuing) 7A for identification is a second road sign saying that streets and roads are patrolled by military police, and it is located approximately thirty or thirty-five yards beyond the sign depicted in 6A for identification.

8A for identification is yet another road sign noting that it says: "Stop one thousand yards Fort Dix information." And that's located another thirty or so yards beyond the second sign.

And the next 9A for identification is a sign pointing to the information booth a thousand yards down on the road giving its hours of operation 8 to 5 daily. It says: "After 5 contact military police building 5211."

10A for identification is a sign stating: "Streets and roads patrolled by military police." It is posted 75 or 80

yards inside the Wrightstown entrance to Fort Dix. I think it's called Fort Dix road.

11A for identification is the same [96] sign: "Streets and roads patrolled by military police" which is posted inside the Pointville Pemberton Road entrance next to the Garden Terrace Housing area about 70 or 80 yards inside the gate of the main gate of the Fort.

12A for identification is a road sign stating: "Housing area is off limits to all personnel except bonafide residents, guests and authorized vendors." This is posted adjacent to the Garden Town Housing area. This is not near an entrance. It is located next to the housing area.

13A for identification is that same sign posted on Saylor's Pond Road adjacent to another housing area on Post. This one is right on the perimeter line of Fort Dix.

By "same sign" you mean the same as this sign indicated in 12A for identification?

A Yes. Yes, the same as that.

14A for identification is that same depicted in 13A for identification and 12A for identification, posted at another housing area, the intersection of Juliustown Road and Pointville Road.

16A for identification is the same sign depicted in 6A for identification stating that all vehicles of Fort Dix are subject to search, and that [97] soliciting is prohibited without the permission of the commanding general. This one is posted at the main gate on Pemberton Road incoming from Pemberton, New Jersey, and it's about 75 or 80 yards inside that gate.

17A for identification is that sign depicted in 16A for identification, and it is posted on Juliustown Road in bound from Brownsville, New Jersey.

18A for identification is the same sign posted on Texas Avenue in bound from Browns Mills.

15A for identification is the sign reading: "Housing areas off limits to all personnel except bonafide residents, guests and authorized vendors," and that's posted again on Saylor's Pond Road adjacent to another housing area on Fort Dix. This is also right on the perimeter line of Fort Dix.

Q Now, do all the pictures that you've just identified, being, namely, 5A for identification through 15A for identification inclusive, faithfully and accurately depict what they purport to show?

A Yes, they do.

MR. HILL: I offer exhibits 5A through 15A inclusive into evidence.

MR. KAIRYS: No objection.

THE COURT: You have no objection?

Mark them.

[98] (5A through 18A received and marked in evidence.)

MR. KAIRYS: I'd just like to ask a couple of questions.

THE COURT: Sure.

CROSS EXAMINATION
BY MR. KAIRYS:

Q This is the one that says: "Stop one thousand yards Fort Dix information"?

A Right.

Q You don't have to stop; do you?

A I never do.

Q No one does unless—

A People who use that information booth.

Q Unless you happen to want information. There is no gate there or sentry or—

A There is no gate or sentry. Just in the information booth which is off the roadway.

Q Okay. So although it says "stop" it's not like a command that you must stop?

A I don't interpret it that way.

Q If you want information, stop?

A That's the way most people interpret it.

Q This is only one entrance. There are many other entrances that don't have signs like this; do they?

[99] A There are information stations at other entrances that are not manned. There is one at the Wrights-

town gate and one on Texas Avenue that have similar information areas.

Q You don't know if they have signs like this and whatnot?

A I'm not sure if they have that particular sign. I do know there is no personnel there.

MR. KAIRYS: Okay. That's all, your Honor.

MR. HILL: I just want to indicate I have been referring to exhibits 5A through 15A which in fact is 18A.

THE COURT: All right. You may step down.

(Witness excused.)

MR. HILL: Your Honor, various regulations, Department of Army Directives, Department of Army Regulations, Fort Dix Regulations and Orders have been marked for identification already. They have all been certified as true copies with the exception of one, which we did not have an opportunity to certify. Mr. Kairys indicated he has no objection to that being into evidence without certification.

[100] I offer exhibits 19A through 36A into evidence.

MR. KAIRYS: No objection.

THE COURT: Mark them.

(Defendant's Exhibits 19A through 36A received and marked in evidence.)

MR. HILL: Next, your Honor, the United States on September the 8th propounded and filed interrogatories—

MR. KAIRYS: It was the defendants—wasn't it? Not the United States.

MR. HILL: The defendants propounded interrogatories to the plaintiffs. With respect to those interrogatories was served on the United States, and at this time we would either like to read into the record the questions and the answers or have it stipulated that the questions and answers be deemed a part of the record of this proceeding, or the answers being admissions by the plaintiffs.

THE COURT: Do you have any problem with that?

MR. KAIRYS: No objection.

THE COURT: Why don't you give me a copy. Just mark it so I can be sure I have it [101] at hand. It should be in the file.

THE CLERK: It should be in the file.

THE COURT: That would be easier.

(Defendant's Exhibits D-37A received and marked in evidence.)

THE COURT: Any other testimony?

MR. HILL: I have no other testimony, your Honor.

[102] THE COURT: All right. Do you want to argue this? How much time do you need?

MR. HILL: Well, from the point of view of the United States, the United States, your Honor wants—the defendants—the United States, of course, has got motions to dismiss pending. It also has a motion for judgment pending pursuant to Rule 41.

I don't know whether your Honor at this point in the proceeding is going to request from all proposed findings of facts, conclusions of law based upon a copy of the transcript which we'll have to buy, which is probably the best course. If that is your Honor's desire, from the point of view of the United States as long as it is deemed that a timely motion is made pursuant to Rule 41 and a motion to dismiss previously filed is pending based on the findings of facts being made by you at a subsequent time, and on any supplemental briefs we want to submit, that's fine with the United States. We'll waive oral argument at this time.

[103] MR. KAIRYS: Your Honor, it's our position that the only issue really open at this time, since there really hasn't been any new evidence that contradicted anything that was other than already in the record on the preliminary injunction, has to do with jurisdiction. And I believe you already have—you have a new brief from them and you have our memo on jurisdiction. I've prepared and suggested final Order which does not have findings of fact. I assume that since the Third Circuit has already ruled on the substance and has found for itself the facts, according to the record—

THE COURT: Well, leave that with me. If I want anything else, I'll let you know. I know both of us are heading into a new adventure on Monday.

MR. KAIRYS: Right. I was hoping you'd either sign it or not, to tell you the truth.

MR. HILL: Your Honor, I just had about two minutes to look at this Order, and this Order is not satisfactory the way it's drawn.

[104] THE COURT: I don't know if it's satisfactory to me because I haven't read it yet. I just received your brief this morning and I have not read that.

In other words, as we all know the status of the case, taking the jurisdictional question aside for a moment, what's different about this than when the Third Circuit upset my applecart?

MR. HILL: I think there are several immediate differences: One. It's a point I made to you in the letter that I directed to you several days ago, and that point involves initially the proposition that when the Third Circuit decided this case, it only did so upon an application for a preliminary injunction. And given that, I don't that that distinction binds you, and I'm really serious—

THE COURT: Yes, but why should I walk into another reversal? Because it's pretty obvious the way they feel; isn't it?

MR. HILL: Frankly, no. It isn't obvious the way they feel. It isn't obvious that you are walking into another [105] rebuttal—reversal and rebuttal.

First, as you know, the decision was two to one. Judge Rosen did not—although he concurred in the result reached by Judge Gibbons, he did not in any way, shape or form agree in the reasoning or in the findings and conclusions that Judge Gibbons made.

THE COURT: This was not heard, I take it?

MR. HILL: No, it was not. Because I don't even know because of the time elements involved whether that opinion was even circulated in the entire panel before it went out.

THE COURT: It was supposed to have been.

MR. HILL: Things happened very quickly in that Circuit opinion. Just knowing what the time elements were in terms of submitting a brief; and when we got that decision, in, terms of when all briefs were submitted, I just don't know. I just don't know.

What's different? Well, of course, [106] we have presented evidence today with respect to the additional military people that were involved. We have presented additional regulations demonstrating more conclusively than before the control situation at Fort Dix in terms of the actual control by the military. We put more evidence on indicating the visual control, that is, the pictures. We've given you more evidence today on the distribution and approval requirements with respect to literature, and that alludes to a whole other point, really.

You were not reversed by the Court of Appeals with respect to your decision in so far as it relates to the pamphleteers. They indicated in their opinion that it was within your discretion at that point in time to deny them preliminary relief. So I'm not altogether sure that there is anything in the merits of the Third Circuit decision that goes to the pamphleteers.

THE COURT: How soon can you get me findings of facts and conclusions?

MR. HILL: That would depend on the [107] transcript. I would like to have those things related to the transcript.

THE COURT: Miss Attardi is going to Camden with us on Monday. I don't know. It will be up to her. Although you recall Judge Gibbons' opinion saying I should put it down quickly.

MR. HILL: Which you have done. There has been no pre-trial in this case.

THE COURT: If we're down there six or seven weeks, and this, you know, I propose to work on it, still we don't have a transcript. Can you do it from your notes, proposed findings?

MR. HILL: It's possible, although Miss Attardi advised me that she was not going to prepare this transcript herself, in any event.

THE COURT: She has to dictate it.

MR. HILL: She adviesd me—

THE COURT: She has to dicate it into a machine.

MR. HILL: She told me she would have someone else dictate it from her notes.

THE COURT: Can you do that?

[108] (Discussion off the record.)

THE COURT: All right, fine. Unless Mr. Kairys' company keeps me exhausted down there, I can work nights on this thing.

MR. KAIRYS: You know, we both do have the Camden 28 case, but I certainly wouldn't want that to interfere.

THE COURT: It won't, as far as I am concerned.

MR. KAIRYS: But I think, if we look back to exactly what the Third Circuit said, they did ask you to make a prompt decision on the jurisdiction question. That's all that is open. They said it should be promptly set down, and we should present the evidence you heard today to see if the pamphleteers meet the jurisdictional requirements and to hear evidence on the candidates, although they virtually said that was sufficient.

THE COURT: So you might know how I'm thinking, I don't know whether to resist the temptation to decide whether or not without proof of damages the First Amendment [109] right doesn't fall within the jurisdiction of the statute. I'm just wondering whether I should get into that.

MR. KAIRYS: I think that's a reasonable view. Certainly, the Third Circuit has eliminated the possibility, the main argument that the Government made. They said they will not follow the argument of the Justice Stone in the Hague v. C.I.O. case.

THE COURT: They indicated that.

MR. KAIRYS: So they asked you to make a determination of whether there is ten thousand. Given that, it's hardly appropriate to say there is less than ten thousand. That I don't think would have justification. And I think the appropriate conclusion would be

either to set a figure from the concrete figures, or to say—to find that it is at least ten thousand. And we have given you, in our memorandum, a lot of authority including Third Circuit that has that kind of thinking.

THE COURT: Did you know what he said there? He said they wouldn't—at that time, they do not feel that—I forget the [110] Judge's name up in New York.

MR. KAIRYS: Judge Weinstein.

THE COURT: —Weinstein, whether his view was unreasonable.

MR. KAIRYS: That's right. But they indicated they were open to that. He taught me civil procedure, by the way. So I like his opinions. But I think, first of all, about what Judge Rosen said, Judge Rosen said he made the main fact finding and joined with Judge Gibbons in that. He said that for the purposes of the Flower decision, this is an open military base.

THE COURT: He thought the Flower decision applied to this Base.

MR. KAIRYS: To this Base, right. So I don't see that we need facts or findings on the substance of issues. If it does, the pamphleteers are on a better decision actually than the candidates. In a sense, they are exactly doing what Flower did. The Third Circuit has already decided that the candidate plaintiffs had a right to campaign there. That's based on Flower. Flower was just the pamphleteer.

[111] Now, certainly the pamphleteer plaintiffs have the same right since the Court has held Flower applies. They had the exact same right that Flower has, which is just hand out leaflets. So it seems to me the substance has completely resolved. The Third Circuit has resolved it. And they asked you to promptly decide jurisdiction, and I think that's really the only finding that's necessary at this point. That's why the Order I've offered you has a permanent injunction, that the first paragraph of it is a finding on jurisdiction.

THE COURT: I hesitate to do it right now without reading over his brief.

MR. KAIRYS: Fine.

THE COURT: And I just got it this morning.

MR. HILL: What was that?

THE COURT: I just got your brief this morning. I said I haven't read it yet.

MR. HILL: Right. If you're inclined simply to read the brief that has been submitted and review the other briefs that [112] have been submitted, then decide, you know, whether or not you want to sign that Order, the Order that has been submitted, without more, if that's your inclination, then there are a couple of points I'd like to make.

THE COURT: No. I am going to wait until you submit your findings of fact, presuming that you can get it done quickly.

MR. HILL: Well, I can get it quickly depending—I would like a transcript though, in that kind of case, since it's obviously going to be reappealed.

MR. KAIRYS: I don't understand why you need this transcript. The whole substance is in on the other transcript.

THE COURT: It's obvious what the defendants are thinking about—unless I miss my guess—that the factual situation here is almost perfect to ask the Supreme Court to get any action. Because there are only five to four on that preliminary hearing. And actually, that's why he wants me to make complete findings all over again.

[113] MR. HILL: I think you would be in trouble if you didn't, frankly.

MR. KAIRYS: Now, given the Third Circuit has already reviewed this, your Honor, the Supreme Court has plenty to review. I don't understand that it would make any difference at this point.

THE COURT: The only thing I'm trying to do is speed him up a little. I'm willing to take it from him, look them over. How fast can you do it after she gets the transcript to you; a couple of days?

MR. HILL: If I get a transcript from her? I would think I could get something to you in, well—I'd like two weeks to get something to you from the time I get the transcript.

MR. KAIRYS: I don't understand why he needs the transcript of today, your Honor. There is nothing in there except what he presented himself. I don't think there is any difference at all. We perhaps introduced more—

THE COURT: I don't see anything to change the factual picture unless to bolster [114] with some photographs.

MR. KAIRYS: Well, he knows what photographs were introduced and he has the whole transcript.

MR. HILL: It is also the jurisdictional question. Mr. Kairys feels that the Third Circuit remanded the matter for you to rubber stamp on the jurisdiction question. I just don't think that's that clear.

MR. KAIRYS: I never said that.

MR. HILL: Yes, you did.

THE COURT: Let's not get into it. That's the reason for speed.

MR. KAIRYS: Yes. I would like to see the mandate of the Third Circuit followed, and I would like us to get a permanent injunction in this case and have it resolved. I'll just reiterate, I'm sure, what your Honor knows. The finding of this case was not subject to Flower, it was ruled clearly erroneous.

THE COURT: That's what he said.

MR. KAIRYS: It was ruled by two out of three.

THE COURT: I don't necessarily have [115] to agree with him.

MR. KAIRYS: Well, that's what the ruling was, your Honor.

THE COURT: No question about it.

MR. KAIRYS: And the facts are not different. So I don't see where you are making findings—we would offer as our proposed findings the opinion of the Third Circuit.

THE COURT: All right. Well, you get them to me as quickly as possible and get them to me down in Camden. My secretary will be here most of the time, and she is coming down, I think, once a week so she can bring them.

MR. HILL: We don't want to delay the imposition of evidence or that you seem to feel that you—

THE COURT: Well, my feeling is I don't have much choice about it. If you want facts to be found by me, again, for the purposes of review, all right. Now, I can make a determination and then find the facts later, just make a decision, reserve the right to file an opinion. But I'll see how [116] fast you move. If you don't, I'll do it that way. All right.

MR. HILL: Okay, Judge. Thank you.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 74-848

BERT A. DAVID, Commander, Fort Dix Military Reservation, et al., PETITIONERS

v.

BENJAMIN SPOCK, et al.

ORDER ALLOWING CERTIORARI. Filed April 14, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

Supreme Court, U. S.
FILED
JUN 19 1975
MICHAEL RODAK, JR., CLERK

Volume II—Exhibits
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-848

THOMAS U. GREER, Commander,
Fort Dix Military Reservation,
JAMES R. SCHLESINGER, Secretary of Defense,
Petitioners,

—v.—

BENJAMIN SPOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 10, 1975
CERTIORARI GRANTED APRIL 14, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-848

THOMAS U. GREER, Commander,
Fort Dix Military Reservation,
JAMES R. SCHLESINGER, Secretary of Defense,
Petitioners,

—v.—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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PLAINTIFFS' EXHIBIT 2A

Photograph of Plaintiffs Ginaven and Misch Distributing Pamphlets, Just Prior to Their Arrest, Inside Wrightstown, New Jersey, Entrance to Fort Dix

[See page E-2]

E-2

PLAINTIFFS' EXHIBIT 7 E-3

Army Times, Page 15 (October 11, 1972)

Why President Nixon is the man to watch your tax dollars.

When someone talks about "reforming" the tax structure, the first question that comes to mind is: how? President Nixon says reform must be broad-based, very fair, very equitable. Senator McGovern wants to go far beyond that. He wants to "redistribute income." Whose income? The middle class—hardly folks with money to burn.

But then again, a "President" McGovern would need lots of money for running the government. He has said he would give $1,000 to every American, whether it's needed or not. He has said that jobs should be held by everyone—even if the government has to create them. He has a program which, according to the Office of Management and Budget, would cost the taxpayers $150 billion *above* what's being spent today.

Extravagant, to be sure. Senator McGovern's extravagance does *not* extend to the military. That's one area in which he talks about budget *cuts*—$32 billion worth of cuts. One result of these would be the closing of some 500 bases in a single year.

So...under George McGovern the serviceman and his family face the prospect of a closed base... a higher tax burden...a militarily weaker America... and who knows what else.

President Nixon—now more than ever? It's something to think about.

Here's how to vote for President Nixon: Contact your unit voting officer for your Federal Post Card Application (FPCA—Standard form 76). Your voting officer will answer your questions.

President Nixon. Now more than ever.

PLAINTIFFS' EXHIBIT 7A

Entrance to Fort Dix on New Jersey Route 68

EXHIBIT D-3A - COST COMPUTATION OF SPOCK CAMPAIGN VISIT

DISPOSITION FORM

For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

REFERENCE OR OFFICE SYMBOL: AUBOPM

SUBJECT: Dr. Spock's Campaign Visit

TO Provost Marshal FROM Operations Officer DATE 29 Jan 73 CMT 1

Military Police Personnel who performed other than normal duty during Dr. Spock's campaign visit on Fort Dix on 4 Nov 72

06	05	04	03	02
Col. Olsen	LTC White	MAJ Beattie	CPT Jackson CPT Kaminsky CPT Kelly	1LT Morrison
01	E-8	E-7	E-6	E-5
2LT Cole 2LT Wilt 2LT Riley	MSG Scaniffe	SFC Duckett SFC Clements	SSG Pike	SGT Gruner SGT McCroy
E-4	E-3	E-2	Totals	
Mitchell	Duttry	McGowan	06 - 1	
Miller	Glace	Melchior	05 - 1	
Humphrey	Russell	Pollinger	04 - 1	
Goss	Kruger	Smith, Robert W.	03 - 1	
Sutton	Lubinski	Young, J.R.	02 - 1	
Hagan	Stroman	Cross	01 - 1	
Jones, P.O.	Vanhise	Thornton	E8 - 1	
Reyes, P. Jr.	Santucci	Pastua	E7 - 2	
Caniff	Cox, Robert T.	Pride	E6 - 1	
Caudill, V.G.	Goodrow	Sallis	E5 - 2	
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Fletcher		E-2	E2 - 2	
Callmway		Dixon, S.D. Clenn, A.D.		

DEFENDANT'S EXHIBIT 3A C 621-72

RONALD C. BEATTIE
MAJ, MPC
Operations Officer

Total cost 1143.50

DA FORM 1 FEB 62 2496 REPLACES DD FORM 96, EXISTING SUPPLIES OF WHICH WILL BE ISSUED AND USED UNTIL 1 FEB 63 UNLESS SOONER EXHAUSTED.

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EXHIBIT D-4A - EXCHANGE SERVICE BULLETIN

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
HEADQUARTERS ARMY AND AIR FORCE EXCHANGE SERVICE
DALLAS, TEXAS 75222

Exchange Service Bulletin
No. 21 (65-1)

22 March 1972

PROCUREMENT AND SALE OF
UNSUITABLE/OFFENSIVE MATERIAL
(Expires 31 March 1973)

REFERENCES.

1. AR 210-10, Installations, Administration.

2. AFR 35-15, Military Personnel, Dissident and Protest Activities.

3. References 1 and 2 implement DOD Directive 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces. They prescribe departmental policy concerning the distribution of publications on military installations.

PURPOSE AND APPLICABILITY.

4. This directive provides general guidelines that may aid in the reduction/elimination of procurement of objectionable/offensive material for exchange sale. It is applicable worldwide.

POLICY.

5. AAFES personnel will not take any action that might be construed as censorship or passing of moral judgment on publications, recordings, greeting cards or other items offered for sale by exchanges. They will, however, refer to installation commanders for review and appropriate guidance, consistent with the policy of the Department of Defense and the military departments (DOD Directive 1325.6, AR 210-10, AFR 35-15), those items to which customers have taken exception as being unsuitable for sale in exchanges.

6. Items which the installation commander officially determines to be unsuitable for sale in the exchange will be removed from sale. Positive action will be taken by AAFES purchasing activities to discontinue procurement of such items.

7. Reply to any inquiry from vendors or individuals concerning the reason for removal from sale or the discontinuance of procurement of any item will cite the advice received from the installation commander. AAFES employees will not engage in discussion, orally or in writing, about the merits of the items so affected.

FOR THE COMMANDER:

Harold E. Gross
HAROLD E. GROSS
Colonel, USAF
Chief of Staff

OPR: MP

DISTRIBUTION: A, B, C, D, E, E – RA, F, S

DEFENDANT'S EXHIBIT 44 10-21-72

EXHIBIT D-19A - DEPARTMENT OF DEFENSE DIRECTIVE
1325.6

September 12, 1969
NUMBER 1325.6

ASD(M&RA)

Department of Defense Directive

SUBJECT Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces

References: (a) U. S. Constitution, First Amendment
(b) Title 50, U. S. Code Appendix, Section 462
(c) Title 18, U. S. Code, Sections 1381, 2387, 2385, 2388
(d) Title 10, U. S. Code, Chapter 47 (Uniform Code of Military Justice)
(e) DoD Directive 1334.1, "Wearing of the Uniform," August 11, 1969

I. PURPOSE AND APPLICABILITY

This Directive provides general guidance governing the handling of dissident activities by members on active duty of the Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.

II. POLICY

It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

EXHIBIT D-19A

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III. SPECIFIC GUIDELINES

The following guidelines relate to principal activities in this area which the Armed Forces have encountered:

A. Possession and Distribution of Printed Materials

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited.

2. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute.

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

B. Off-Post Gathering Places. Commanders have the authority to place establishments "off-limits," in accordance with established procedures, when, for example, the activities taking place there, including counselling members to refuse to perform duty or to desert, involve acts with a significant adverse effect on members' health, morale, or welfare.

C. Servicemen's Organizations. Commanders are not authorized to recognize or to bargain with a so-called "servicemen's union."

D. Publication of "Underground Newspapers." Personal writing for publication may not be pursued during duty hours, or accomplished by the use of Government or non-appropriated fund property. While publication of "underground newspapers" by military personnel off-post, on their own time and with their own money and equipment, is not prohibited, if such a publication

contains language the utterance of which is punishable under Federal law, those involved in the printing, publication, or distribution may be disciplined for such infractions.

E. On-Post Demonstrations and Similar Activities. The Commander of a military installation shall prohibit any demonstration or activity on the installation which could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops. It is a crime for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or re-enter an installation after having been barred by order of the Commander (18 U. S. C. 1382).

F. Off-Post Demonstrations by Members. Members of the Armed Forces are prohibited from participating in off-post demonstrations when they are on duty, or in a foreign country, or when their activities constitute a breach of law and order, or when violence is likely to result, or when they are in uniform in violation of DoD Directive 1334.1 (reference (e)).

G. Grievances. The right of members to complain and request redress of grievances against actions of their commanders is protected by Article 138 of the Uniform Code of Military Justice. In addition, a member may petition or present any grievance to any member of Congress (10 U. S. C. 1034). An open door policy for complaints is a basic principle of good leadership, and Commanders should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action.

IV. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Two (2) copies of implementing regulations shall be forwarded to the Assistant Secretary of Defense (Manpower and Reserve Affairs) within ninety (90) days.

Secretary of Defense

Enclosure - 1
Constitutional and Statutory Provisions

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CONSTITUTIONAL AND STATUTORY PROVISIONS RELEVANT TO HANDLING OF DISSIDENT AND PROTEST ACTIVITIES IN THE ARMED FORCES

A. Constitution: The First Amendment, U.S. Constitution, provides as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. Statutory Provisions:

1. Applicable to All Persons

a. 18 U.S.C. § 1381 -- Enticing desertion.

b. 18 U.S.C. § 2385 -- Advocating overthrow of the Government.

c. 18 U.S.C. § 2387 -- Counselling insubordination, disloyalty, mutiny, or refusal of duty.

d. 18 U.S.C. § 2388 -- Causing or attempting to cause insubordination.

e. 50 U.S.C. App. § 462 -- Counselling evasion of the draft.

2. Applicable to Members of the Armed Forces

a. 10 U.S.C. § 917 (Article 117, UCMJ) -- Provoking speech or gestures.

b. 10 U.S.C. § 882 (Article 82, UCMJ) -- Soliciting desertion, mutiny, sedition, or misbehavior before the enemy.

c. 10 U.S.C. § 904 (Article 104, UCMJ) -- Communication or corresponding with the enemy.

d. 10 U.S.C. § 901 (Article 101, UCMJ) -- Betraying a countersign.

e. 10 U.S.C. § 888 (Article 88, UCMJ) -- Contemptuous words by commissioned officers against certain officials.

f. 10 U.S.C. § 889 (Article 89, UCMJ) -- Disrespect toward his superior commissioned officer.

g. 10 U.S.C. § 891 (Article 91, UCMJ) -- Disrespect toward a warrant officer or noncommissioned officer in the execution of his office.

h. 10 U.S.C. § 892 (Article 92, UCMJ) -- Failure to obey a lawful order or regulation.

i. 10 U.S.C. § 934 (Article 134, UCMJ) -- Uttering disloyal statement, criminal libel, communicating a threat, and soliciting another to commit an offense.

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EXHIBIT D-19A - DEPARTMENT OF DEFENSE DIRECTIVE
1344.10

September 23, 1969
NUMBER 1344.10

ASD(M&RA)

Department of Defense Directive

SUBJECT Political Activities by Members of the Armed Forces

References: (a) Joint Agreement between the War and Navy Departments, dated 13 March 1944, subject: "Participation of Members of the Armed Services in Political Campaigns" (hereby cancelled)
(b) 10 U.S.C. 101(8)
(c) 50 U.S.C. 1475; 18 U.S.C. 592, 593, 594, 596, 602, 603, 606, 607, 608 - Enclosure 2
(d) 10 U.S.C. 973(b)
(e) Article 88, Uniform Code of Military Justice, 10 U.S.C. 888
(f) DoD Directive 1334.1, "Wearing of the Uniform," August 11, 1969
(g) DoD Directive 5210.9, "Military Personnel Security Program," June 19, 1956
(h) DoD Directive 1325.6, "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces" September 12, 1969

I. PURPOSE AND APPLICABILITY

This Directive governs the political activities of members on active duty of the Army, Navy, Air Force, Marine Corps, and by agreement with the Secretary of Transportation, the Coast Guard. Its provisions apply to the Military Departments and in the case of Coast Guard, the Department of Transportation.

II. CANCELLATION

Reference (a) is hereby superseded and cancelled.

EXHIBIT D-19A

BEST COPY AVAILABLE

III. DEFINITIONS

A. Partisan Political Activity is activity in support of or related to candidates representing, or issues specifically identified with, National or State political parties and associated or ancillary organizations.

B. Non-partisan Political Activity is activity in support of or related to candidates not representing, or issues not specifically identified with, National or State political parties and associated or ancillary organizations. (Issues relating to Constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with National or State political parties.)

C. Active Duty is full-time duty in the active military service of the United States for a period of more than 30 days.

D. Civil Office is an office, not military in nature, that involves the exercise of the powers or authority of civil government. It may be either an elective or an appointive office under the United States, a Territory or Possession, or a State, county, or municipality, or official subdivision thereof. The term "civil office" shall not include offices to which military personnel may be assigned in a military status.

E. Full-Time Service is any service in connection with a civil office that is likely to interfere with regular military duties.

F. Secretary Concerned. As used herein, the term has the same meaning as reference (b).

IV. POLICY GUIDELINES

A member of the Armed Forces (hereinafter referred to as "member") is expected and encouraged to carry out his obligations as a citizen, but while he is on active duty he is prohibited by paragraph 3 of enclosure 1 in certain circumstances from becoming a candidate for or holding civil office, and in engaging in partisan political activities. Subject to paragraph 3 of enclosure 1, the Secretaries concerned will issue instructions consistent with the following general principles:

Exhibit D-19A - Department of Defense Directive
1344.10

Continuation of IV.

A. General

1. A member may:

a. Register, vote, and express his personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

b. Make monetary contributions to a political organization.

c. Attend partisan as well as non-partisan political meetings or rallies as a spectator when not in uniform.

2. A member may not:

a. Use his official authority or influence for the purpose of interfering with an election, or affecting the course of its outcome, or of soliciting votes for a particular candidate or issue, or of requiring or soliciting political contributions from others.

b. Be a candidate and hold civil office except under the conditions set forth in B. and C. below.

c. Participate in partisan political management, campaigns, or conventions.

d. Make campaign contributions to a partisan political candidate, to another member of the Armed Forces, or to an employee of the Federal Government.

3. To assist in applying the foregoing general provisions to particular factual situations, enclosure 1 contains representative examples of political activities which are deemed permissible or prohibited. These guidelines do not supersede other related Department of Defense directives, such as the instructions contained in references (f), (g), and (h), but are to be used in conjunction with them.

4. Enclosure 2 contains a summary of Federal statutes prohibiting certain types of political activities by members of the Armed Forces.

Exhibit D-19A Department of Defense Directive
Continuation of IV. 1344.10

B. Candidacy for Elective Office

1. A member subject to this Directive may not campaign as a partisan candidate for nomination or as a partisan nominee for civil office. However, where the circumstances justify, the Secretary concerned or his designee may permit the member to file such evidence of his nomination or candidacy for nomination as may be required by law. Such permission shall not authorize activity while on active duty that is otherwise prohibited by this Directive.

2. A member may not become a non-partisan candidate for any civil office requiring full-time service while serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receive schooling, or other training wholly or partly at the expense of the United States.

C. Release of Military Personnel Elected or Appointed to Civil Office

1. Officers on the active list of a regular component of an Armed Force may not hold a civil office, except as otherwise provided by law. The acceptance of such a civil office or the exercise of the functions of the office terminates the officer's military appointment as provided by reference (d).

2. Officers on the active list of a reserve component of an armed force and enlisted personnel who are elected as a partisan candidate to any civil office or as a non-partisan candidate to a civil office requiring full-time service, or who are appointed to a civil office requiring full-time service may be retired, discharged, or released to inactive duty, as may be appropriate. However, such officers and members will not be retired, discharged, or released to inactive duty if they are serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receiving schooling, instruction, or other training, wholly or partly at the expense of the United States.

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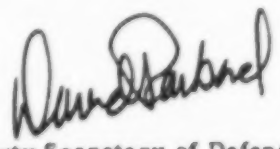
V. IMPLEMENTATION AND EFFECTIVE DATE

A. This Directive will be effective sixty (60) days from the date of issuance.

B. Two (2) copies of implementing instructions shall be forwarded to the Assistant Secretary of Defense (Manpower and Reserve Affairs) within sixty (60) days.



Deputy Secretary of Defense

Enclosures - 2
1. Political Activities; Supplemental Guidelines
2. List of Statutes

1. Purpose. This Enclosure provides guidance with respect to the implementation of this Directive.

2. Examples of Types of Political Activity Permitted. In accordance with the policies established in Section IV., a member on active duty may:

a. Register, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

b. Promote and encourage other military personnel to exercise their franchise, provided such promotion does not constitute an attempt to influence or interfere with the outcome of an election.

c. Join a political club and attend its meetings when not in uniform.

d. Serve in a local part-time non-partisan civil office, appointive or elective, e.g., chairman P.T.A., provided the requirements of the office do not interfere with military duties and the member receives the prior approval of the Secretary concerned or his designee.

e. Serve as an election official, provided such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has the prior approval of the Secretary concerned, or his designee.

f. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces.

g. Write a letter to the editor of a newspaper expressing the member's personal views concerning public issues, provided those views do not attempt to promote a partisan political cause.

h. Write a personal letter, not for publication, expressing preference for a specific political candidate or cause, provided the action is not part of an organized letter-writing campaign in behalf of a partisan political cause or candidate.

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i. Make monetary contributions to a political party or political committee favoring a particular candidate or slate of candidates subject to the limitations of sections 607 and 608 of title 18, United States Code.

j. Display a political sticker on his or her private automobile.

3. Types of Activities Prohibited. In accordance with the statutory restrictions set forth in reference (c) and the policies established in Section IV., a member on active duty shall not:

a. Use official authority or influence for the purpose of interfering with an election, affecting the course or outcome thereof, soliciting votes for a particular candidate or issue or requiring or soliciting political contributions from others.

b. Be a partisan candidate for civil office, Federal, State, or local except under the conditions set forth in Section IV, of this Directive, or engage in public or organized solicitation of others to become partisan candidates for nomination or election to civil offices.

c. Participate in partisan political management or campaigns, or make public speeches in the course thereof.

d. Make a campaign contribution to another member of the Armed Forces or to a civilian officer or employee of the United States for the purpose of promoting a political objective or cause.

e. Solicit or receive a campaign contribution from another member of the Armed Forces or from a civilian officer or employee of the United States for the purpose of promoting any political objective or cause.

f. Allow or cause to be published partisan political articles signed or authored by the member for the purpose of soliciting votes for or against a partisan political party or candidate.

g. Serve in any official capacity or be listed as a sponsor of a partisan political club.

h. Speak before a partisan political gathering of any kind to promote a partisan political party or candidate.

i. Participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate.

j. Conduct a political opinion survey under the auspices of a partisan political group, or distribute partisan political literature.

k. Use contemptuous words against the office holders described in reference (e), or participate in the activities proscribed by reference (g).

l. Perform clerical or other duties for a partisan political committee during a campaign or on election day.

m. Solicit or otherwise engage in fund raising activities in Federal offices or facilities, including military reservations, for a partisan political cause or candidate.

n. March or ride in a partisan political parade.

o. Display a large political sign, banner, or poster on the top or side of his or her private automobile (as distinguished from a political sticker).

p. Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by or associated with a partisan political party or candidate.

q. Sell tickets for or otherwise actively promote political dinners and other such fund-raising events.

r. Attend, as official representatives of the Armed Forces, partisan political events even though they do not actively participate.

4. Activities Not Expressly Allowed or Prohibited. Some activities not expressly prohibited would be contrary to the spirit and the intent of the Directive. In determining whether or not an activity violates the traditional concept that military personnel must not engage in partisan political activity, rules of reason and common sense will apply. Any activity that could be interpreted as associating the Departments of Defense or Transportation, in the case of the Coast Guard, or any element thereof directly or indirectly with a partisan political cause or candidate must be avoided.

5. Non-Partisan Political Activity. The Directive does not preclude participation in local non-partisan political campaigns. However, a member taking part in local non-partisan political activity shall not:

   a. Wear a uniform while campaigning or use any property or facilities of the Government in the campaign.

   b. Allow participation to interfere with or prejudice performance of military duties.

   c. Engage in conduct which would in any way imply that the Department concerned or any element thereof is taking a position or is involved in the campaign.

6. Members on Active Duty for Training. The Directive does not apply to members on active duty for training who are serving for a period of not more than 30 days. While on such active duty for training, however, a member is expected to:

   a. Give full time and attention to the performance of military duties during prescribed duty hours.

   b. Avoid any outside activities that would be prejudicial to the performance of military duties or inconsistent with the accepted traditions of the Armed Forces.

   c. Refrain from participating in any political activity while in military uniform, or using government facilities in furtherance of political activities.

Statutory Prohibitions Pertaining to Political Activity by Members of the Armed Forces

Members of the Armed Forces are prohibited from certain types of political activity by statutes which prescribe specific penalties for violation. Most directly applicable are the several sections of United States Code quoted as follows:

"Title 50, U.S.C., § 1475. Undue influence; free discussion

"It shall be unlawful for any commissioned, noncommissioned, warrant, or petty officer in the Armed Forces (1) to attempt to influence any member of the Armed Forces to vote or not to vote for any particular candidate, or (2) to require any member of the Armed Forces to march to any polling place or place of voting, but nothing in this chapter shall be deemed to prohibit free discussion regarding political issues or candidates for public office. Aug. 9, 1955, c. 656, Title III. § 305, 69 Stat. 589."

"Title 18, U.S.C., § 592. Troops at polls

"Whoever, being an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States.

"This section shall not prevent any officer or member of the armed forces of the United States from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote. June 25, 1948, c. 645, 62 Stat. 719."

"Title 18, U.S.C., § 593. Interference by armed forces

"Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any State; or

"Whoever, being such officer or member, prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any

qualified voter of any State from fully exercising the right of suffrage at any general or special election; or

"Whoever, being such officer or member, orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote; or

"Whoever, being such officer or member, imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law; or

"Whoever, being such officer or member, interferes in any manner with an election officer's discharge of his duties--

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both; and disqualified from holding any office of honor, profit or trust under the United States.

"This section shall not prevent any officer or member of the Armed Forces from exercising the right of suffrage in any district to which he may belong, if otherwise qualified according to the laws of the State of such district. June 25, 1948, c. 645, 62 Stat. 719."

"Title 18, U.S.C., § 594. Intimidation of voters

"Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories and Possessions at any election held solely or in part for the purpose of electing such candidate, shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 7

"Title 18, U.S.C., § 596, Polling armed forces

"Whoever, within or without the Armed Forces of the United States, polls any member of such forces, either within or without the United States, either before or after he executes any ballot under any Federal or State law, with reference to his choice of or his vote for any

candidate, or states, publishes, or releases any result of any purported poll taken from or among the members of the Armed Forces of the United States or including within it the statement of choice for such candidate or of such votes cast by any member of the Armed Forces of the United States, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

"The word 'poll' means any request for information, verbal or written, which by its language or form of expression requires or implies the necessity of an answer, where the request is made with the intent of compiling the result of the answers obtained, either for the personal use of the person making the request, or for the purpose of reporting the same to any other person, persons, political party, unincorporated association or corporation, or for the purpose of publishing the same orally, by radio, or in written or printed form. June 25, 1948, c. 645, 62 Stat. 720."

"Title 18, U.S.C., § 602. Solicitation of political contributions

"Whoever, being a Senator or Representative in, or Delegate or Resident Commissioner to, or a candidate for Congress, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, directly or indirectly solicits, receives, or is in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person, shall be fined not more than $5,000 or imprisoned not more than three years or both. June 25, 1948, c. 645, 62 Stat. 722."

"Title 18, U.S.C., § 603. Place of solicitation

"Whoever, in any room or building occupied in the discharge of official duties by any person mentioned in section 602 of this title, or in any navy yard, fort, or arsenal, solicits or receives any contribution of money or other thing of value for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both. June 25, 1948, c. 645, 62 Stat. 722; Oct. 31, 1951, c. 655; § 20(b), 65 Stat. 718."

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"Title 18, U.S.C., §606. Intimidation to secure political contributions

"Whoever, being one of the officers or employees of the United States mentioned in section 602 of this title, discharges, or promotes, or degrades, or in any manner changes the official rank or compensation of any other officer or employee, or promises or threatens so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both. June 25, 1948, c. 645, 62 Stat. 722."

"Title 18, U.S.C., §607. Making political contributions

"Whoever, being an officer, clerk, or other person in the service of the United States or any department or agency thereof, directly or indirectly gives or hands over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress, or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object, shall be fined not more than $5,000 or imprisoned not more than three years, or both. June 25, 1948, c. 645, 62 Stat. 722."

"Title 18, U.S.C., §608. Limitations on political contributions and purchases

"(a) Whoever, directly or indirectly, makes contributions in an aggregate amount in excess of $5,000 during any calendar year, or in connection with any campaign for nomination or election, to or on behalf of any candidate for an elective Federal office, including the offices of President of the United States and Presidential and Vice Presidential electors, or to or on behalf of any committee or other organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such office or the success of any national political party, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"This subsection shall not apply to contributions made to or by a State or local committee or other State or local organization or to similar committees or organizations in the District of Columbia or in any Territory or Possession of the United States.

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Sept 23, 69

"(b) Whoever purchases or buys any goods, commodities, advertising, or articles of any kind or description, the proceeds of which, or any portion thereof, directly or indirectly inures to the benefit of or for any candidate for an elective Federal office including the offices of President of the United States, and Presidential and Vice Presidential electors or any political committee or other political organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such office or the success of any national political party, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"This subsection shall not interfere with the usual and known business, trade, or profession of any candidate.

"(c) In all cases of violations of this section by a partnership, committee, association, corporation or other organization or group of persons, the officers, directors, or managing heads thereof who knowingly and willfully participate in such violation, shall be punished as herein provided.

"(d) The term 'contribution', as used in this section shall have the same meaning prescribed by section 591 of this title. June 25, 1948, c. 645, 62 Stat. 723."

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Exhibit D-19A - Department of Defense Directive 1344.10

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
1344.10 - Ch 1	March 20, 1970	1300 series

ATTACHMENTS - None

INSTRUCTIONS FOR RECIPIENTS

The following pen change to DoD Directive 1344.10, "Political Activities by Members of the Armed Forces," dated September 23, 1969, has been approved, effective immediately:

PEN CHANGE

Enclosure 1, paragraph 2.d., line 2: Delete - "e.g., chairman P.T.A.,"

Maurice W. Roche
MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 68 106-1 PREVIOUS EDITIONS ARE OBSOLETE

Exhibit D-19A - Department of Defense Directive 1344.10

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
Ch 2 to 1344.10	October 24, 1972	1300 series

ATTACHMENTS Pages 3 and 4 to DoD Directive 1344.10, 9/23/69

INSTRUCTIONS FOR RECIPIENTS

The following page changes to DoD Directive 1344.10, "Political Activities of Members of the Armed Forces," September 23, 1969, have been authorized:

PAGE CHANGES

Remove: Pages 3 and 4
Insert: Attached replacement pages

Changes appear on page 4 and are indicated by marginal asterisks.

EFFECTIVE DATE AND IMPLEMENTATION

The above changes are effective immediately. Two copies of implementing instructions shall be forwarded to Assistant Secretary of Defense (Manpower and Reserve Affairs) within 30 days.

Maurice W. Roche
MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Comptroller)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 68 106-1

Continuation of IV.

A. General

1. A member may:

a. Register, vote, and express his personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

b. Make monetary contributions to a political organization.

c. Attend partisan as well as non-partisan political meetings or rallies as a spectator when not in uniform.

2. A member may not:

a. Use his official authority or influence for the purpose of interfering with an election, or affecting the course of its outcome, or of soliciting votes for a particular candidate or issue, or of requiring or soliciting political contributions from others.

b. Be a candidate and hold civil office except under the conditions set forth in B. and C. below.

c. Participate in partisan political management, campaigns, or conventions.

d. Make campaign contributions to a partisan political candidate, to another member of the Armed Forces, or to an employee of the Federal Government.

3. To assist in applying the foregoing general provisions to particular factual situations, enclosure 1 contains representative examples of political activities which are deemed permissible or prohibited. These guidelines do not supersede other related Department of Defense directives, such as the instructions contained in references (f), (g), and (h), but are to be used in conjunction with them.

4. Enclosure 2 contains a summary of Federal statutes prohibiting certain types of political activities by members of the Armed Forces.

Continuation of IV.

B. Candidacy for Elective Office

1. A member subject to this Directive may not campaign as a partisan candidate for nomination or as a partisan nominee for civil office. However, where the circumstances justify, the Secretary concerned or his designee may permit the member to file such evidence of his nomination or candidacy for nomination as may be required by law. Such permission shall not authorize activity while on active duty that is otherwise prohibited by this Directive.

2. A member may not become a non-partisan candidate for any civil office requiring full-time service while serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receive schooling, or other training wholly or partly at the expense of the United States.

C. Release of Military Personnel Elected or Appointed to Civil Office

1. Officers on the active list of a regular component of an Armed Force may not hold a civil office, except as otherwise provided by law. The acceptance of such a civil office or the exercise of the functions of the office terminates the officer's military appointment as provided by 10 U.S.C. 973(b), (reference (d)).

2. Officers on the active list of a reserve component of an armed force and enlisted personnel who are elected as a partisan candidate to any civil office or as a non-partisan candidate to a civil office requiring full-time service, or who are appointed to a civil office requiring full-time service may be retired, discharged, or released to inactive duty, as may be appropriate. However, such officers and members will not be retired, discharged, or released to inactive duty if they are serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receiving schooling, instruction, or other training, wholly or partly at the expense of the United States. The Secretary concerned, in appropriate cases, may release a reservist from his active duty obligation and permit him to accept the civil office to which he was elected.

#First amendment (Ch 2, 10/24/72)

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EXHIBIT D-19A - DEPARTMENT OF DEFENSE DIRECTIVE
5410.18

February 9, 1968
NUMBER 5410.18

ASD(PA)

Department of Defense Directive

SUBJECT Community Relations

Refs: (a) DoD Directive 5410.18, "Community Relations," April 21, 1965 (hereby cancelled)
(b) DoD Directive 5122.5, "Assistant Secretary of Defense (Public Affairs)," July 10, 1961
(c) DoD Instruction 5410.19, "Requests for Armed Forces Participation in Public Events Supporting Community Relations Programs," April 21, 1965
(d) DoD Instruction 5410.20, "Public Affairs Liaison With Industry," February 9, 1968
(e) thru (o) - see enclosure 1

I. REISSUANCE

This Directive combines previous issuances of Department of Defense (DoD) community relations policies on the use of Armed Forces personnel, facilities and materiel in the execution of Defense community relations programs. Reference (a) is hereby superseded and cancelled.

II. APPLICABILITY

The provisions of this Directive apply to all DoD components and to the public affairs aspects of those programs or activities receiving financial assistance from any such component.

III. TERMS

The two terms basic to this Directive are defined below. Other pertinent terms are defined in enclosure 2.

A. Community Relations is the relationship between the military and civilian communities.

B. Community Relations Program is that command function which evaluates public attitudes, identifies the mission of a military organization with the public interest, and executes a program of action to earn public understanding and acceptance. Community relations programs are conducted at all levels of command, both in the United States and overseas, by military organizations having a community relations area of responsibility. Community relations programs include, but are not limited to, such activities as liaison and cooperation with industry, with industrial, technical, and trade associations, with labor, and with other organizations and their local affiliates at all levels; Armed Forces participation in international, national, regional, State and local public events; installation open houses and tours, embarkations in naval vessels, orientation tours for distinguished civilians; people-to-people and humanitarian acts; cooperation with government officials and community leaders; and encouragement of Armed Forces personnel and their dependents to participate in all appropriate aspects of local community life.

IV. POLICY

A. General

1. The interest, understanding and cooperation of the civilian community in DoD activities are dependent upon sound Armed Forces community relations program at home and abroad. The objectives of such programs are to develop, improve and maintain full understanding by the American people and our allies overseas and their support of the mission of the DoD to defend the United States and the Free World; to demonstrate U. S. partnership with our allies in collective security; and to develop an awareness that U. S. military personnel are dedicated, highly trained individuals. These programs must be conducted always in a manner free from racial discrimination and fostering equal treatment for Armed Forces personnel and their families.

2. Active participation of military units and military personnel and their dependents as individuals in civilian activities, organizations, and programs is an important factor in establishing and maintaining a state of mutual acceptance, respect, cooperation and appreciation between the Armed Forces and civilian communities affected by their operations.

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B. Participation in Community Relations Programs. Community Relations programs are authorized and encouraged for the following purposes subject to operational requirements for personnel, facilities and materiel resources; the significance of the event or program in relation to other DoD programs, and cost considerations:

1. Informing the public on the state of preparedness of the DoD and to demonstrate United States partnership with allies in collective security and the mutuality of United States and host nations' interests.

2. Developing public understanding of and cooperation with the DoD in its community relations program.

3. Promoting national security and stimulating patriotic spirit.

4. Assisting recruiting and personnel procurement programs of the Armed Forces.

C. Guidelines

1. Department of Defense participation and cooperation must not directly or indirectly (a) endorse or selectively benefit or favor, or appear to endorse or selectively benefit or favor, any private individual, sect, fraternal organization, commercial venture, or political group, or (b) be associated with solicitation of votes in a political election.

   a. DoD cooperation in commercial advertising, publicity and other promotional activities will be based on the provisions of DoD Directive 5500.7, DoD Instruction 5410.10, 10 USC 18, Section 701, section 5a of the Federal Trade Commission Act, DoD Instruction 5410.20 (references (c), (h), (i) and (d)), and enclosure 2. Particular attention will be given to the presence of (1) factual inaccuracies; (2) reference to and use of classified military information and equipment; (3) material reflecting adversely on the DoD or its elements; (4) implications concerning relative utility and reliability of DoD materiel; (5) references to DoD specification details and to results of acceptance tests. Use of official insignia will be separately considered, as outlined in V.D., below.

   b. DoD participation shall be incidental to the event except for programs of a patriotic nature, celebration of national holidays, or events which are open to the general public at no charge for admission. A general admission charge need not of itself deny DoD participation. However, no specific or additional charge may be made to observe the authorized DoD participation. The provisions of this paragraph do not apply to those special bands (U.S. Navy Band, U.S. Marine Band and U.S. Air Force Band) engaged in authorized concert tours conducted at no additional cost to the government.

   c. Armed Forces support to nationally-recognized Veterans' organizations is authorized when the participation is in support of programs oriented to the veteran rather than the sectarian or national origin objectives of the organization. Similarly, Armed Forces support to non-public schools is authorized when the participation is clearly in support of educational or personnel procurement programs.

2. DoD participation in any public event within the purview of this Directive is authorized only if admission, seating and all other accommodations and facilities connected with the event or activity are available to all without regard to race, creed, color, or national origin. The provisions of references (k) through (m) also pertain.

3. DoD participation in support of fund-raising efforts will normally be limited to the federated and joint campaigns authorized by DoD Directive 5035.1 (reference (g)) and its attachment, the Manual on Fund-Raising within the Federal Service, such appeals as the President or the Chairman of the Civil Service Commission may authorize, and the military aid societies. In view of the national interest, the Armed Forces may also support sports or other public events held for the sole purpose of raising funds for United States teams competing in the Pan American Games and Olympic Games (see DoD Directive 1330.4 (reference (f)). Armed Forces support to fund-raising events or projects for a single cause, even though the prospective recipient is a member of one of the federated, joint or authorized campaigns, or the proceeds are to be donated in part to one or several of the recognized campaigns, is inconsistent with the basic position.

a. Exceptions to policy in IV. C3, above, are made for those special concert bands engaged in authorized concert tours being conducted at no additional cost to the government; and for overseas Unified and Specified Commands (except within the States of Alaska and Hawaii) whose commanders desire to authorize and permit participation in athletic or sports competition within their commands in support of local or indigenous fund-raising efforts.

b. In communities where two or more components are stationed, commanders shall coordinate their response to requests for Armed Forces participation when it is apparent that more than one of them may be involved. Coordinated planning and execution of such participation will be as directed by the military commanders concerned. Commanders will ensure that participation is appropriate in scope and type and limited to those occasions which are in keeping with dignity and good taste. The national, regional, state or local significance of the event and the agency sponsoring the event will be used as guides in determining the scope and type of DoD participation to be authorized.

D. Command Support. Appropriate recognition should be given by the Secretaries of the Military Departments, Commanders of Unified and Specified Commands, Directors of Defense Agencies, and commanders at all levels, to the outstanding accomplishments of commands or individuals in improving community relations. The exchange of information among DoD components and their field agencies concerning effective programs is encouraged.

E. Programming, Budgeting and Financing

1. The Secretaries of the Military Departments and the Directors of Defense Agencies will make provisions in their programming, budget estimates and financing programs for conducting effective community relations programs consistent with the provisions of this Directive, including the budgeting and financing requirements of the programs developed by Commanders of Unified and Specified Commands. The cost of participating in or furnishing resources for a community relations event will be the responsibility of the component involved and must be accomplished within financing available to it. The financial requirements for these purposes will be kept to the minimum necessary to accomplish DoD objectives.

2. Costs of participation will normally be at government expense for the following types of events and programs when they are in the primary interest of the DoD:

   a. DoD or civic-sponsored public observances of U.S. (or host country) national holidays.

   b. Official civil ceremonies and functions.

   c. Speaking engagements.

   d. Programmed, scheduled tours by military information activity support units (U.S. Army Exhibit Unit, U.S. Navy Exhibit Unit and U.S. Air Force Orientation Group) when this method of reaching special audiences is considered by the Secretaries of the Military Departments concerned to be the most effective and economical way of accomplishing a priority public information or community relations program. The Assistant Secretary of Defense (Public Affairs) (ASD(PA)) will monitor this program.

   e. Tours by units, such as the U.S. Army Field Band, when appropriated funds are specifically provided for such participation.

   f. Events considered to be in the national interest, or in the professional, scientific or technical interests of a DoD component, when approved by the Secretary of Defense or the Commander of an overseas Unified or Specified Command, as appropriate.

   g. Support of personnel procurement activity. Such participation is properly chargeable to personnel procurement programs and is governed by IV.C. 1.a., above. Personnel procurement activity is otherwise exempt from the provisions of this Directive.

3. DoD participation in all other public events of mutual benefit to the DoD and the sponsor of the event will normally be at no additional cost to the government. The event will be financed as follows:

a. Additional cost to the government as defined in paragraph J, enclosure 2, will be reimbursed by the sponsor.

b. Other services, when required by the nature of the event, will be provided by the sponsor as follows: ground transportation between an airport and the event, unless within a local installation's community relations area as defined in paragraph L, enclosure 2; rental space, utilities and custodial services; public liability and property damage insurance for aerial demonstrations; and such other services determined necessary by the DoD component participating in the event and agreed to be provided by the sponsor.

c. Continuing-type costs to the government, which would have existed had the DoD not participated in the event, will not be reimbursed by the sponsor. These costs as defined in paragraph K, enclosure 2, represent the DoD share of the costs of events of mutual benefit.

V. RESPONSIBILITIES AND AUTHORITIES

A General. Secretaries of the Military Departments, Commanders of Unified and Specified Commands, and the Directors of the Defense Agencies are responsible to the Secretary of Defense for community relations. Commanders at all levels will give positive emphasis to the importance of good community relations in the execution of their missions.

B. The ASD(PA) is designated (see DoD Directive 5122.5, reference (b)) to act for and in behalf of the Secretary of Defense in implementing the provisions of this Directive, including:

1. Granting any exceptions thereto.

2. Screening requests for DoD participation in:

a. international and national events, except those taking place in overseas areas which are primarily of internal concern to Unified or Specified Commanders as outlined in V.C., below;

b. community relations programs and public events in areas outside the United States which have an interest and impact extending beyond the Unified and Specified Command area, or which require assistance from outside the command area;

c. public events in the Washington, D. C., area;

d. aerial demonstrations, parachute team demonstrations or simulated tactical demonstrations held off military installations except those held in areas assigned to overseas Unified and Specified Commands;

e. post-season bowl games, sports contests held off base with professional opposition, or formal international competitions, except as noted in V.C.3., below; and

f. Armed Forces Day activities as covered in DoD Directive 5400.5 (reference (e)).

3. Publishing a monthly Defense Industry Bulletin as a means of direct communication with the industrial community (see DoD Instruction 5410.20 (reference d)).

4. Developing and issuing supplementary policies and procedures, in coordination with the Assistant Secretary of Defense (Manpower) and the Assistant Secretary of Defense (Comptroller) on matters affecting their assigned responsibilities.

C. Overseas Unified and Specified Commanders are delegated authority to:

1. Plan and execute community relations programs in accordance with the provisions of this Directive in the States of Alaska and Hawaii and in overseas areas for which they have command responsibility. This authority may be delegated. Participation in events held in the States of Alaska and Hawaii will be governed by the same principles and policies applicable to other states.

2. Except for events held within the States of Alaska and Hawaii, overseas Unified and Specified Commanders are designated to act for and in behalf of the Secretary of Defense in implementing the provisions of this Directive within their commands and in granting any exceptions thereto. This authority may be delegated.

3. Policy direction and guidance for overseas community relations programs, consistent with the overall policy guidance in this Directive will be provided by the overseas Unified and Specified Commanders rather than by the Military Departments or Defense Agencies.

4. Commanders of Unified and Specified Commands, in coordination with their component commanders, will conduct effective community relations programs, consistent with the provisions of this Directive, and will provide through established channels, for the inclusion of such programming, budget estimates and financing programs of the appropriate Military Departments, as provided for in IV. E., above.

D. Secretaries of Military Departments and Directors of Defense Agencies (within their respective areas of responsibility) are authorized to plan and execute community relations programs and approve Armed Forces participation in public events not otherwise reserved or assigned in V. B. and C., above. This authority may be delegated. They will continue to use their discretion concerning unofficial use of official insignia of their respective organizations, unless elsewhere prohibited by Public Law.

E. Coordination. Community relations programs and public events taking place within the fifty United States which have an effect on a Unified or Specified Command as a whole or are otherwise of significant concern to a Unified or Specified Command, require complete coordination between the Command and the Military Department(s) concerned. This same rationale is applicable to coordination with Commands through the appropriate component command for community relations programs and participation in public events requiring the support of the Military Departments.

VI. RECORDS AND REPORTS

The ASD(PA) will be kept informed regarding all significant community relations programs. To ensure proper national level planning and coordination of programs which involve other activities of the U. S. Government and foreign governments; to answer inquiries from the Congress, the press, and the general public; to provide a basis for recognition of outstanding command or individual accomplishments; and to evaluate program effectiveness, records will be kept, and a report will be submitted as follows:

A. A semi-annual report, to cover significant community relations programs accomplished during the period, and planned for the following six months, will be submitted to the ASD (PA) as prescribed enclosure 3. This report, covering the periods January 1 through June 30, and July 1 through December 31, and planned for the following six (6) months, will be submitted directly to the ASD(PA) by the Secretaries of the Military Departments and Commanders of the Unified and Specified Commands, not later than March 1 and August 31 respectively (see enclosure 3).

B. Commanders of Unified Commands will include in their semi-annual reports as prescribed in enclosure 3 only those significant programs which are multi-Service, command-wide, or multi-national in scope and interest; which required, or will require support from outside the normal resources of their command; or which require specific coordination and guidance from the Unified Commander or from the ASD(PA). Reports by the Secretaries of the Military Departments as prescribed in enclosure 3 will not include the types of programs which are reported by Unified Commanders, but will be limited to significant programs of single-Service interest and significant local command activities.

C. Information included in reports on Armed Forces Day, as required by DoD Directive 5400.5 (reference (e)), will not be included in semi-annual community relations reports.

D. In addition to the semi-annual reports on significant community relations programs as directed above, records of specific public events in support of community relations programs will be maintained by commanders at appropriate levels as determined by the Secretaries of the Military Departments, the Commanders of the Unified and Specified Commands and the Directors of the separate agencies of the DoD. Records will be in sufficient detail to provide information to the Secretary of Defense if required. They will include, as a minimum, date and place of event; sponsor, names and titles of sponsoring officials; names and titles of principal military officials participating; speakers, troop units, bands, exhibits, demonstrations, and administrative support provided; estimated size of civilian audience; and the total additional cost to the government.

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E. The report required of this Directive has been assigned Report Control Symbol DD-PA (SA) 656.

VII. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Five copies of revised proposed implementing regulations to be published to conform to this Directive will be forwarded to the ASD(PA) for review and approval within sixty (60) days.

Paul H. Nitze
Deputy Secretary of Defense

Enclosures - 3
1. References (continued)
2. Glossary of terms
3. Semi-Annual DoD Community Relations Report

Exhibit D-19A - Department of Defense Directive
5410.18

REFERENCES (Continued)

(e) DoD Directive 5400.5, "Armed Forces Day," December 3, 1965

(f) DoD Directive 1330.4, "Participation in International Sports Competition," April 19, 1962

(g) DoD Directive 5035.1, "Fund-Raising Within the Department of Defense," September 22, 1964

(h) DoD Directive 5500.7, "Standards of Conduct," August 8, 1967

(i) 10 United States Code 18, Section 701

(j) Section 5a, Federal Trade Commission Act (38 Stat. 719), as amended (15 United States Code 45)

(k) DoD Directive 5120.36, "Equal Opportunity in the Armed Forces," July 26, 1963

(l) DoD Directive 5500.11, "Nondiscrimination in Federally Assisted Programs," December 28, 1964

(m) DoD Directive 5525.2, "Processing of Requests by Military Personnel for Action by Attorney General Under Civil Rights Act," July 24, 1964

(n) DoD Directive 5122.8, "Use of Military Carriers for Public Affairs Purposes," December 13, 1963

(o) DoD Instruction 5435.2, "Delegation of Authority to Approve Travel In and Use of Military Carriers for Public Affairs Purposes," December 13, 1963

GLOSSARY OF TERMS

The following terms, which apply for purposes of this Directive, are furnished as an aid in determining the suitability, appropriate degree, type of financing of DoD participation in public events, official civil ceremonies, community relations programs and similar events.

A. INTERNATIONAL, NATIONAL, REGIONAL, STATE AND LOCAL EVENTS.

1. An international event is one which the audience and/or participation is drawn from the United States and at least one other nation.
2. A national event is one in which the audience and/or participation is drawn from the United States as a whole.
3. A regional event is one in which the audience and/or participation is drawn from two or more states of the United States.
4. A state event is one in which the audience and/or participation is drawn from that state as a whole.
5. A local event is one within a state which centers on and is of primary interest to a single community.

Corresponding classifications may be made in overseas areas by the Unified and Specified Commanders.

B. DOD PARTICIPATION - includes any use of Armed Forces personnel as individuals or as units; facilities, and materiel to include aircraft, ships, exhibits and equipment in support of community relations programs.

C. AERIAL DEMONSTRATIONS - flight demonstrations, jumps, personnel or equipment drops by Armed Forces personnel or aircraft for public affairs purposes.

D. PERSONNEL, FACILITIES AND MATERIEL UTILIZATION - the use or appearance of individuals or groups or units of military personnel, performing units and marching units, drill teams, drum and bugle (or drum and fife) corps; single-Service or joint-Service color details, honor and security cordons, military bands and choral groups or their components; use of Armed Forces facilities, to include aircraft, ships and installations; and the use of Armed Forces materiel and equipment to include exhibits and loanable or donable items for community relations purposes.

E. ARMED FORCES EXHIBITS - any display for public affairs purposes of Armed Forces materiel. Specifically included are items of

equipment, models, devices and information and orientation materiel placed for public information purposes before audiences at conventions, conferences, seminars, demonstrations, exhibits, fairs or similar events. Also included are general purpose displays in public buildings or public locations. Excluded are operable aircraft.

F. PUBLIC EVENTS - programs held in the civil domain to include all ceremonies, demonstrations, exhibitions, expositions, athletic contests, fairs, trade or air shows, conventions, meetings, symposia or similar programs not connected with the military functioning of the DoD and intended primarily for non-military audiences. Exercises, movements or maneuvers conducted as a part of military training, even though incidentally observed by the general public, are not considered public events.

G. FRATERNAL GROUPS - societies whose members are banded together for mutual benefit or for work towards a common goal. They include, but are not limited to, such organizations as the Fraternal Order of the Eagles, Benevolent and Protective Order of Elks, Loyal Order of the Moose, Free and Accepted Masons (Scottish Rite, York Rite and Shrine), Knights of Columbus, Knights Templar, Independent Order of Odd Fellows, and Order of the Eastern Star. Service or luncheon clubs, such as Rotary International, Kiwanis International, Lions International, Optimists, Toastmasters International or Junior Chambers of Commerce, are not considered fraternal groups.

H. OFFICIAL CIVIL CEREMONIES - those public events sponsored and conducted by Federal, State, county and municipal governments, to include, in overseas areas, corresponding authorities of the host nation. Official civil ceremonies include inaugurals, dedications of public buildings and projects, ceremonies for officially invited governmental visitors, and the convening of legislative bodies. Community or civic celebrations such as banquets, dinners, receptions, carnivals, festivals, opening of sports seasons, and anniversaries are not considered official civil ceremonies even though sponsored or attended by civic or governmental dignitaries.

I. HOLIDAYS

1. National holidays are those prescribed by Federal Law; i.e., New Years Day (January 1); Washington's Birthday (February 22); Memorial Day (May 30); Independence Day (July 4); Labor Day (1st Monday in September); Veterans Day (November 11); Thanksgiving Day (4th Thursday in November); Christmas Day (December 25).

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2. Armed Forces Day (3rd Saturday in May) will be treated as a national holiday for purposes of this Directive.

3. State holidays are those officially proclaimed by an individual state as holidays to be observed in that state.

4. Primary, general and special election days are not considered holidays.

5. A corresponding classification of "host nation" holidays may be made in overseas areas by Unified and Specified Commanders.

J. ADDITIONAL COST TO THE GOVERNMENT - that cost financed from the operation and maintenance type appropriation available to the DoD component furnishing the government resources for a public event of mutual benefit to the DoD and the sponsor of the event. Additional costs normally include but are not necessarily limited to the following items: travel and transportation of military personnel, meals or lodging or per diem allowances payable under the provisions of the Joint Travel Regulations, and the transporting, handling and cost of aviation fuel if such fuel is not available at military contract price at the staging base.

K. DOD SHARE OF COSTS - The DoD share of costs for events of mutual benefit will normally include those continuing-type costs to the government which would exist if the DoD component did not participate in the event, such as: regular pay and allowances of the Armed Forces, small incidental expenses of an installation (e.g. local transportation, telephone calls, etc.), and other minor expenses as may be determined by the DoD component participating in the event. The use of routine training flights or military aircraft for the transport of military personnel, if requested by a component, approved, and determined to be available, is also considered to be a DoD share of costs for an event of mutual benefit. See references (n) and (o).

L. COMMUNITY RELATIONS AREA - that geographical area wherein DoD facilities and/or personnel have a social or economic impact on the populace.

M. WASHINGTON, D.C., AREA - the District of Columbia, the City of Alexandria, Virginia, the Counties of Arlington and Fairfax, Virginia, and the Counties of Montgomery and Prince Georges in Maryland, together with incorporated municipalities lying within these borders.

N. INDUSTRY - Any and all commercial enterprises, including "non-profit" firms, whose function is that of producing or providing goods, services, or construction for public or private consumption or use.

O. DEFENSE CONTRACTOR - Any industrial concern or other entity which has executed, and is currently operating within the terms of, a contract with a DoD Component. Included are education institutions, but only when engaged in DoD contract production of goods or services.

P. DEPARTMENT OF DEFENSE INSIGNIA - Includes medals, decorations, badges, cap devices, ribbons, buttons, rosettes, emblems, patches, flags, seals, coats of arms, shoulder, lapel, and sleeve insignia, and any devices used to indicate grade, rating, branch, service, or duty assignment.

Exhibit D-19A - Department of Defense Directive
5410.18

5410.18 (Encl 3)
Feb 9, 68

SEMI-ANNUAL DOD COMMUNITY RELATIONS REPORT

Semi-Annual DoD community relations reports will be submitted (see VI of this Directive) in the following format and substance:

1. Programs: List in brief narrative form the major community relations programs conducted during the reporting period, with special attention to:

a. Exceptional accomplishment and results: List major community relations programs that have been particularly successful, giving reasons for success. Enclose pictures, press clippings, if available.

b. Problem Areas: Include problems such as a shortage of personnel, facilities and equipment; base closures or reductions; law enforcement; public housing; racial issues; military noise problems; and public criticism of specific programs, actions or policies.

c. Solutions: Programs to solve problems listed above, including successes and failures. Enclose pictures, press clippings or other materials as appropriate to illustrate problems or to demonstrate success.

e. Forecast: Include brief outline of significant community relations programs to be conducted in next six months which have potential national, international or wide regional interest, or which are likely to have major impact, either favorable or unfavorable, on public opinion. All activities which involve more than one military Service or more than one major command should be included.

Exhibit D-19A - Department of Defense Directive 5410.18

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5410.18 - Ch 2 (Supersedes Ch 1, 4/8/68)	November 27, 1968	5400 series

ATTACHMENTS

Enclosure 3 to DoD Directive 5410.18, Feb 9, 68.

INSTRUCTIONS FOR RECIPIENTS

The following page and pen changes to DoD Directive 5410.18, "Community Relations," dated February 9, 1968, have been authorized:

PAGE CHANGE

Remove: Enclosure 3
Insert: Attached Enclosure 3

Current changes are indicated by marginal asterisks. Previous change is superseded.

PEN CHANGES

Page 1 and Enclosure 1 - Change references (c) and (f) to read:

(c) DoD Instruction 5410.19, "Armed Forces Participation in Public Events Supporting Community Relations Programs," November 26, 1968
(f) DoD Directive 1330.4, "Participation in Interservice National and International Sports Activities," November 14, 1968

Pages 6 and 7, paragraph IV. E. 3. - Change the last two lines of 3. (page 6) to read:

"additional cost to the government (see paragraph J., enclosure 2).";

and delete ALL of 3. a., b., and c. from page 7.

Changed portion of paragraph 3. is underscored.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Two (2) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Public Affairs) within sixty (60) days.

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 68 106-1 PREVIOUS EDITIONS ARE OBSOLETE

Exhibit D-19A - Department of Defense Directive 5410.18

SEMI-ANNUAL DOD COMMUNITY RELATIONS REPORT

Reports should be submitted in brief narrative form on the programs listed below.

1. Exceptional accomplishment and results: Include those programs or events which were exceptionally successful with particular emphasis on those which could be adopted by other Services and Commands.

2. Problem Areas:

a. Report problems or occurrences which were overcome including the method or techniques used to solve them. Particular attention should be paid to those which might confront another Service or Command.

b. Report problems or occurrences which this Headquarters should be aware of because of their national or international significance.

c. Report problems or occurrences which require assistance from either ourselves or another service or command in resolving or limiting their impact. (Include any recommendations or requests you may have for specific assistance.)

3. Forecast: Include a brief outline of significant programs or events which will occur in the next six months. Include only those which have potential national, international, or wide regional interest, or which are likely to have major impact, either favorable or unfavorable, on public opinion. All activities which involve more than one Military Service or Unified and Specified Command should be included.

*Second amendment (Ch 2, 11/27/68)

Exhibit D-19A- Department of Defense Directive 5410.18

DEPARTMENT OF DEFENSE DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5410.18 - Ch 3	March 31, 1972	5410 series

ATTACHMENTS - None

INSTRUCTIONS FOR RECIPIENTS

The following interim changes are authorized to DoD Directive 5410.18, "Community Relations," February 9, 1968, pending its complete revision:

PEN CHANGES

1. Page 8 - Delete Paragraph V. B. 3.

2. Pages 9, 10 and 11 - Delete Section VI. RECORDS AND REPORTS. Report Control Symbol DD-PA(SA)656 is cancelled.

3. Enclosure 1 -

a. Change reference (k) to read:

"DoD Directive 1100.15, 'Equal Opportunity Within the DoD,' December 14, 1970"

b. Change the date of reference (l) to: "May 27, 1971"

4. Enclosure 3 - Remove Enclosure 3

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Comptroller)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 68 106-1 PREVIOUS EDITIONS ARE OBSOLETE

EXHIBIT D-20A DEPARTMENT OF ARMY GUIDANCE ON DISSENT

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
WASHINGTON, D.C. 20310

IN REPLY REFER TO

AGAM-P (M) (27 May 69) DCSPER-SARD 23 June 1969

SUBJECT: Guidance on Dissent

TO: All Commanders

1. In the past few weeks there have been press reports suggesting a growth in dissent among military personnel. Questions have been raised concerning the proper treatment of manifestations of soldier dissent when they occur. The purpose of this letter is to provide general guidance on this matter. Specific dissent problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with provisions of applicable Army regulations.

2. It is important to recognize that the question of "soldier dissent" is linked with the Constitutional right of free speech and that the Army's reaction to such dissent will -- quite properly -- continue to receive much attention in the news media. Any action taken at any level may therefore reflect -- either favorably or adversely -- on the image and standing of the Army with the American public. Many cases involve difficult legal questions, requiring careful development of the factual situation and application of various constitutional, statutory, and regulatory provisions (See Appendix A). Consequently, commanders should consult with their Staff Judge Advocates and may in appropriate cases confer with higher authority before initiating any disciplinary or administrative action in response to manifestations of dissent. The maintenance of good order and discipline and the performance of military missions remains, of course, the responsibility of commanders.

3. "Dissent," in the literal sense of disagreement with policies of the Government, is a right of every citizen. In our system of Government, we do not ask that every citizen or every soldier agree with every policy of the Government. Indeed, the First Amendment to the Constitution requires that one be permitted to believe what he will. Nevertheless, the Government and our citizens are entitled to expect that, regardless of disagreement, every citizen and every soldier will obey the law of the land.

4. The right to express opinions on matters of public and personal concern is secured to soldier and civilian alike by the Constitution and laws of the United States. This right, however, is not absolute

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for either soldier or civilian. Other functions and interests of the Government and the public, which are also sanctioned and protected by the Constitution, and are also important to a free, democratic and lawful society, may require reasonable limitations on the exercise of the right of expression in certain circumstances. In particular, the interest of the Government and the public in the maintenance of an effective and disciplined Army for the purpose of National defense justifies certain restraints upon the activities of military personnel which need not be imposed on similar activities by civilians.

5. The following general guidelines are provided to cover some of the manifestations of dissent which the Army has encountered.

a. Possession and distribution of political materials.

(1) In the case of publications distributed through official outlets such as Post Exchanges and Post Libraries, a commander is authorized to delay distribution of a specific issue of a publication in accordance with the provisions of para. 5-5 of AR 210-10. Concurrently with the delay, a commander must submit a report to the Department of the Army, ATTN: CINFO. A commander may delay distribution only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops.

(2) In the case of distribution of publications through other than official outlets, a commander may require that prior approval be obtained for any distribution on post. Distribution without prior approval may be prohibited. A commander's denial of authority to distribute a publication on post is subject to the procedures of para. 5-5, AR 210-10, discussed above.

(3) A commander may not prevent distribution of a publication simply because he does not like its contents. All denials of permission for distribution must be in accordance with the provisions of para. 5-5, AR 210-10. For example, a commander may prohibit distribution of publications which are obscene or otherwise unlawful (e.g., counselling disloyalty, mutiny, or refusal of duty). A commander may also prohibit distribution if the manner of accomplishing the distribution materially interferes with the accomplishment of a military mission (e.g., interference with training or troop formation). In any event, a commander must have cogent reasons, with supporting evidence, for any denial of distribution privileges. The fact that a publication is critical -- even unfairly critical -- of government policies or officials is not in itself, a grounds for denial.

(4) Mere possession of a publication may not be prohibited; however, possession of an unauthorized publication coupled with an

attempt to distribute in violation of post regulations may constitute an offense. Accordingly, cases involving the possession of several copies of an unauthorized publication or other circumstances indicating an intent to distribute should be investigated.

b. Coffee Houses.

The Army should not use its off-limits power to restrict soldiers in the exercise of their Constitutional rights of freedom of speech and freedom of association by barring attendance at coffee houses, unless it can be shown, for example, that activities taking place in the coffee houses include counselling soldiers to refuse to perform duty or to desert, or otherwise involve illegal acts with a significant adverse effect on soldier health, morale or welfare. In such circumstances, commanders have the authority to place such establishments "off limits" in accordance with the standards and procedures of AR 15-3. As indicated, such action should be taken only on the basis of cogent reasons, supported by evidence.

c. "Serviceman's Union."

Commanders are not authorized to recognize or to bargain with a "serviceman's union." In view of the constitutional right to freedom of association, it is unlikely that mere membership in a "serviceman's union" can constitutionally be prohibited, and current regulations do not prohibit such membership. However, specific actions by individual members of a "servicemen's union" which in themselves constitute offenses under the Uniform Code of Military Justice or Army regulations may be dealt with appropriately. Collective or individual refusals to obey orders are one example of conduct which may constitute an offense under the Uniform Code.

d. Publication of "Underground Newspapers."

Army regulations provide that personal literary efforts may not be pursued during duty hours or accomplished by the use of Army property. However, the publication of "underground newspapers" by soldiers off-post, on their own time, and with their own money and equipment is generally protected under the First Amendment's guarantees of freedom of speech and freedom of the press. Unless such a newspaper contains language, the utterance of which is punishable under Federal law (e.g., 18 U.S.C. Sec. 2387 or the Uniform Code of Military Justice), authors of an "underground newspaper" may not be disciplined for mere publication. Distribution of such newspapers on post is governed by para. 5-5, AR 210-10, discussed in para. 5a above.

e. On-Post Demonstrations by Civilians.

A commander may legally bar individuals from entry on a military reservation for any purpose prohibited by law or lawful regulation,

and it is a crime for any person who has been removed and barred from a post by order of the commander to re-enter. However, a specific request for a permit to conduct an on-post demonstration in an area to which the public has generally been granted access should not be denied on an arbitrary basis. Such a permit may be denied on a reasonable basis such as a showing that the demonstration may result in a clear interference with or prevention of orderly accomplishment of the mission of the post, or present a clear danger to loyalty, discipline, and morale of the troops.

f. On-Post Demonstrations by Soldiers.

AR 600-20 and 600-21 prohibit all on-post demonstrations by members of the Army. The validity of these provisions is currently being litigated. Commanders will be advised of the results of this litigation.

g. Off-Post Demonstrations by Soldiers.

AR 600-20 and 600-21 prohibit members of the Army from participating in off-post demonstrations when they are in uniform, or on duty, or in a foreign country, or when their activities constitute a breach of law and order, or when violence is likely to result.

h. Grievances.

The right of members to complain and request redress of grievances against actions of their superiors is protected by the Inspector General system (AR 20-1) and Article 138, UCMJ. In addition, a soldier may petition or present any grievance to any member of Congress (10 U.S.C. Sec. 1034). An open door policy for complaints is a basic principle of good leadership, and commanders should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action. Complaining personnel must not be treated as "enemies of the system." Even when complaints are unfounded, the fact that one was made may signal a misunderstanding, or a lack of communication, which should be corrected. In any system as large as the Army, it is inevitable that situations will occur giving rise to valid complaints, and over the years such complaints have helped to make the Army stronger while assuring compliance with proper policies and procedures.

6. It is the policy of the Department of the Army to safeguard the service member's right of expression to the maximum extent possible, and to impose only such minimum restraints as are necessary to enable the Army to perform its mission, in the interest of National defense. The statutes and regulations referred to above (as well as some other provisions of law and regulations) are concerned with these permissible restraints and authorize a commander to impose restrictions on the military members's right of expression and dissent, under certain circumstances. However, in applying any such statutes and regulations in particular situations, it is important to remember that freedom of expression is a fundamental right secured by the Constitution. Furthermore, it is important to

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Exhibit D-20A Department of Army Guidance on Dissent

AGAM-P (M) (27 May 69) DCSPER-SARD 23 June 1969
SUBJECT: Guidance on Dissent

remember that the Commander's responsibility is for the good order, loyalty and discipline of all his men. Severe disciplinary action in response to a relatively insignificant manifestation of dissent can have a counter productive effect on other members of the Command, because the reaction appears out of proportion to the threat which the dissent represents. Thus, rather than serving as a deterrent, such disproportionate actions may stimulate further breaches of discipline. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. In the final analysis no regulations or guidelines are an adequate substitute for the calm and prudent judgment of the responsible commander.

7. The mission of the Army is to execute faithfully, as ordered, policies and programs established in accordance with law by duly elected and appointed Government officials. Unquestionably, the vast majority of service members are prepared to do what is required of them to perform that mission, whether or not they agree in every instance with the policies the mission reflects.

BY ORDER OF THE SECRETARY OF THE ARMY:

C. A. STANFIEL
Colonel, AGC
Acting The Adjutant General

1 Incl
App A

This letter is a reproduction of letter, same file and subject, dated 28 May 1969, which was given a limited distribution.

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Exhibit D-20A Department of Army Guidance on Dissent
Guidance on Dissent

Appendix

Subject: Constitutional, Statutory and Regulatory Provisions

a. Constitution: The First Amendment, U. S. Constitution, provides as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

b. Statutory Provisions: The following statutory provisions may be relevant in considering problems of dissent in the armed forces:

Applicable to All Persons

(1) 18 U. S. C. Sec. 1381 -- Enticing desertion.

(2) 18 U. S. C. Sec. 2387 -- Counselling insubordination, disloyalty, mutiny, or refusal of duty.

(3) 18 U. S. C. Sec. 2388 -- Causing or attempting to cause insubordination.

(4) 50 U. S. C. App. Sec. 462 -- Counselling evasion of the draft.

Applicable to Members of the Army

(5) 10 U. S. C. Sec. 917 (Article 117, UCMJ) -- Provoking speech or gestures.

(6) 10 U. S. C. Sec. 882 (Article 82, UCMJ) -- Soliciting desertion, mutiny, sedition or misbehavior before the enemy.

(7) 10 U. S. C. Sec. 904 (Article 104, UCMJ) -- Communication or corresponding with the enemy.

(8) 10 U. S. C. Sec 901 (Article 101, UCMJ) -- Betraying a countersign.

Exhibit D-20A Department of Army Guidance on Dissent

(9) 10 U. S. C. Sec. 888 (Article 88, UCMJ) -- Contemptuous words by commissioned officers against certain officials.

(10) 10 U. S. C. Sec. 889 (Article 89, UCMJ) -- Disrespect toward his superior commissioned officer.

(11) 10 U. S. C. Sec 891 (Article 91, UCMJ) -- Disrespect toward a warrant officer or noncommissioned officer in the execution of his office.

(12) 10 U. S. C. Sec 892 (Article 92, UCMJ) -- Failure to obey a lawful order or regulation.

(13) 10 U. S. C. Sec. 934 (Article 134, UCMJ) -- Uttering disloyal statements.

c. Regulations: The following Army Regulations may also be relevant in dealing with problems posed by "soldier dissent":

(1) AR 210-10, paragraph 5-5 -- Dissemination of publications.

(2) AR 360-5, paragraph 9b -- Submission for review of unofficial writings or speeches.

(3) AR 380-5 -- Divulgence of National security information.

(4) AR 600-20 -- Political activities (paragraph 42) and participation in demonstrations (paragraph 46).

(5) AR 600-20, paragraph 31 -- Appearance and conduct.

(6) AR 604-10 -- Discharge of personnel who are active members of subversive organizations.

(7) AR 670-5 -- Wearing of unauthorized items on the uniform.

U. S. GOVERNMENT PRINTING OFFICE: 1969 O - 356 631

EXHIBIT D-21A - ARMY REGULATION 210-10, PARAGRAPH 5-5

6 September 1971

C 5, AR 210-10
*AR 210-10

ARMY REGULATION
No. 210-10

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, 30 September 1968

INSTALLATIONS
ADMINISTRATION

This copy is a reprint which includes current pages from Changes 1 through 5.

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*This regulation supersedes AR 210-10, 24 September 1963, including all changes and DA message 862115, 30 April 1968, and rescinds Reports Control Symbol Budget-1969.

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5-3. **Hitchhiking.** Hitchhiking is prohibited by the Army. This does not preclude acceptance of offers of rides voluntarily made by individuals or properly accredited organizations nor does it preclude the use of properly authorized and established share-the-ride or similar stations which may be sanctioned by the local military authorities. The establishment and use of such facilities will be encouraged in the interests of both soldierly conduct and safety.

5-4. **Young Men's Christian Association.** *a.* At installations where Young Men's Christian Association buildings have been constructed pursuant to law (10 U.S.C. 4778) the Young Men's Christian Association will be permitted to continue to conduct helpful physical, intellectual, and nonsectarian religious activities. The installation commander will assist and facilitate these activities in such ways as he may deem appropriate and desirable.

b. Duly appointed secretaries of the association serving at such installations will be permitted to purchase from the quartermaster such available supplies as are necessary for use in connection with official activities.

5-5. **Protection of loyalty, discipline, and morale.** *a. Objectives.* The maintenance of loyalty, discipline, and morale among Army troops is essential if the Army is to continue to provide a reliable and effective military force responsive to the national security missions assigned pursuant to lawful authority. At the same time, troops are generally entitled to the free access to news and publications which other citizens enjoy.

b. Responsibility. Installation commanders will encourage and promote the availability to service personnel of books, periodicals, and other amusement media which present a wide range of viewpoints on public issues. Such media should include those emphasizing the standards of loyalty, patriotism, and discipline which are common to the Armed Forces. However, installation commanders will *not*, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications are are other citizens.

c. Restrictions on dissemination of publications. If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

d. Reports. Concurrently with imposing a delay as authorized in *c* above, the installation commander will so inform the next major commander and Headquarters, Department of the Army (Chief of Public Information, extension 74200), and request from Headquarters, Department of the Army, approval to prohibit the distribution of that publication or the particular issue thereof. Telephonic communication will be used in each instance. If the publication in question is one which is unlikely to be available at Headquarters, Department of the Army, a copy of the publication or a transcript of the text of the portion giving rise to the dissemination restriction will be forwarded to Headquarters, Department of the Army, by the fastest available means. The delay in distribution will remain in force until the decision to approve or disapprove the request is made. These reports are exempt under provisions of paragraph 7-2*a*, AR 335-15.

e. Distribution outlets. An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the publication in question is published primarily for advertising or promotional purposes, a denial of a request for

permission to distribute a publication will be reported as required in *d* above.

5-6. **Sales of State tax-free beer, tobacco products, and soft drinks by nonappropriated fund activities.** The installation commander is responsible for the control of the sale of State tax-free beer, tobacco products, and soft drinks in accordance with AR 60-10 and AR 230-1.

5-7. **Liquor control.** *a.* Within the United States and Puerto Rico, the sale of, or dealing in, intoxicating liquors will be conducted in accordance with AR 210-65.

b. Overseas, except in Alaska, Hawaii, and Puerto Rico, the sale of, dealing in, and use of intoxicating liquors at military installations will be under such regulations as may be prescribed by the oversea commander directly under Headquarters, Department of the Army.

5-8. **Privileges at installations.** The installation commander is responsible for the granting of privileges at facilities under his jurisdiction. See AR 28-62, AR 28-125, AR 31-200, AR 60-10, AR 210-55, and AR 230-60.

5-9. **Gifts and donations.** The acceptance of any gifts, devices, or bequest of money or property, real or personal, for benefit of, or in connection with, the establishment, operation, maintenance, or administration of any school, hospital, library, museum, cemetery, or other institution or organization under the jurisdiction of the Department of the Army is subject to the provisions of AR 1-100. The acceptance of gifts by nonappropriated funds is governed by AR 230-1.

5-10. **Gifts for distribution to individuals.** The acceptance of a voluntary proffer of property from individuals or organizations for distribution to Army personnel is governed by AR 1-101.

5-11. **American National Red Cross.** See AR 930-5.

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EXHIBIT D-22A - DEPARTMENT OF ARMY MESSAGE

DEPARTMENT OF THE ARMY
STAFF COMMUNICATIONS DIVISION

PPD
Primary Action

D-22-A

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ZNY EEEEE
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FM DA //DAIO-PP//
TO AIG 7401
BT

UNCLAS E F T O
SUBJ: IMPOSITION OF A TIME REQUIREMENT ON PROCESSING REQUESTS FOR DISTRIBUTION OF PUBLICATIONS OF ARMY INSTALLATIONS
A. AR 210-10
PENDING REVISION OF PARA 5-5 OF REF A THE FOLLOWING ADDITIONAL GUIDANCE IS PROVIDED: COMMANDERS WILL REVIEW THE PUBLICATION IN QUESTION, MAKE RECOMMENDATIONS WITH THE REASONS THEREFOR AND DISPATCH THE ACTION TO DEPARTMENT OF THE ARMY (WITH APPROPRIATE INFORMATION COPIES TO INTERMEDIATE HEADQUARTERS) WITHIN FIVE (5) WORKING DAYS OF RECEIPT OF A REQUEST FOR DISTRIBUTION. IT IS ESSENTIAL THAT THE COMMANDER IN HIS RECOMMENDATION TO DA STATE THE FACTUAL BASIS FOR HIS DETERMINATION SHOULD THAT DETERMINATION INDICATE THAT THE PUBLICATION CONSTITUTES A CLEAR DANGER TO DISCIPLINE, LOYALTY, OR MORALE OF MILITARY PERSONNEL ON THE INSTALLATION OR THAT THE PROPOSED MANNER OF DISTRIBUTION MATERIALLY INTERFERES WITH THE ACCOMPLISHMENT OF A MILITARY MISSION.
BT
#7238
NNNN

ACTION

SCDI38 ANNOTATIONS
DAIO-3//DACA-FI-1(E), ATLIA-1, ICLO-1, CEPA-3
DRATER GILSTRAP 53894 RELEASER CHURCH 75081

EXHIBIT D-24A - ARMY REGULATION 600-20, SECTION III AND APPENDIX A

ARMY REGULATION
No. 600-20

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, *28 April 1971*

PERSONNEL—GENERAL

ARMY COMMAND POLICY AND PROCEDURE

Effective 15 June 1971, except paragraph 5-39 which is effective 7 May 1971 in accordance with DA Message DCSPER-PSD 072249Z May 71.

This regulation establishes policy and prescribes certain procedures relative to the several basic aspects of command, military conduct and discipline, and the determination of precedence and date of rank. Local limited supplementation of this regulation is permitted but is not required. If supplements are issued, Army Staff agencies and major Army commands will furnish one copy of each to The Adjutant General, ATTN: AGAO-R; other commands will furnish one copy of each to the next higher headquarters.

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This copy is a reprint which includes current pages from Change 1.

*This regulation supersedes AR 600-20, 31 January 1967, including all changes, and DA messages DCSPER-PSD 252149Z May 70, subject: Interim Change to AR 600-20; and DCSPER-PSD 072249Z May 71, subject: Army Haircut Policy.

AGO 9402A

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gations of nonsupport are seldom in evidence. At the other end of the spectrum are those families which have become disunited by a formal divorce decree which usually provides for monetary support. Generally, , therefore, cases requiring action by commanders concerned are those where husband and wife are voluntarily separated. In such cases the member, from his own pay, should furnish to his legal dependents an amount at least equal to the previous contribution of an enlisted man serving in his grade, prior to January 1963, plus his present basic allowance for quarters. Before 1 January 1963, an enlisted member in pay grade E–4 (over 4 years' service) or higher had $60 or $80 withheld from his pay and added to the basic allowance for quarters to form the superseded class Q allotment. Thus a member is in essence receiving a gratuitous pay raise if he only contributes the amount of the current basic allowance for quarters.

5–26. Command responsibilities. The best judge of the facts in each case is the immediate commander of the member concerned. He is on the site, may know the member and his problems intimately and will have the benefit of face-to-face discussion. Under the Dependents Assistance Act of 1950 wherein class Q allotments were mandatory when dependency was proven, and the Finance Center, U.S. Army, had the authority to initiate a class Q allowance over the objection of the service member, the role of the commander was not quite so prominent. It thus behooves commanders at all echelons to supervise the handling of these cases with the overall goal of equitable and prompt solution of each. It is particularly important that the complainant be given a complete reply by the commander, one that is courteous and factual, bereft of evasion and vague promises, and with no hint of "brushoff." Finally, command action of a monitoring nature must ensue to insure that statements, promises, etc., of the member are in fact carried out expeditiously.

5–27. Action by commanders. *a.* In considering appropriate measures to be taken in cases of nonsupport of dependents, commanders must bear in mind that any action which will reduce the member's ability to pay may further compound the financial problem for both the member and his dependents. Since issues of support ordinarily will involve a variety of legal questions, commanders should seek the advice of an appropriate judge advocate relative to those legal issues which may be raised and with respect to any matters about which the judge advocate may have knowledge and experience. In general, no matter how proficient a member may be in military skills, his inability to manage his personal affairs may jeopardize his value to the service. When command action in accordance with this regulation has not secured the cooperation of the member in supporting his dependents, consideration should be given to his elimination from the service through the use of appropriate procedures (AR 635–212).

b. The provisions of this section do not normally apply in the case of retired personnel not on active duty. Routine complaints of nonsupport should be answered by a statement that any action in connection with the financial obligations of retired personnel not on active duty, is outside the responsibility of the Army and that the command regrets that it cannot be of assistance in the matter. Requests for exception to policy may be forwarded to The Adjutant General, ATTN: AGAO-KA, Department of the Army, Washington, DC 20315, when, in the opinion of the reviewing officer, the complaint justifies consideration by the active military.

Section III. POLITICAL ACTIVITIES

5–28. Explanation of terms. For the purpose of this section the following explanations will apply:

a. Civil office. An office, not military in nature, that involves the exercise of the powers or authority of civil government. It may be either an elective or an appointive office under the United States, a Territory or Possession, or a State, county, or municipality, or official subdivisions thereof. The term "civil office" does not include offices to which military personnel [illegible] be assigned in a military status.

b. Full-time service. Any service in connection with a civil office that is likely to interfere with regular military duties.

c. Nonpartisan political activity. An activity in support of or related to candidates not representing, or issues not specifically identified with, National or State political parties and associated or ancillary organizations. (Issues relating to Constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with National or State political parties.)

d. Partisan political activity. An activity in support of or related to candidates representing, or issues specifically identified with, National or State political parties and associated or ancillary organizations.

5–29. Political activities. A member of the Army is expected and encouraged to carry out his obligations as a citizen, but while he is on active duty he is prohibited in certain circumstances from becoming a candidate for or holding civil office (para 5–30 and 5–31), and in engaging in partisan political activities. The following general principles apply:

a. A member may—

(1) Register, vote, and express his personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

(2) Make monetary contributions to a political party or political committee favoring a particular candidate or slate of candidates subject to the limitations of sections 607 and 608 of title 18 United States Code.

(3) Attend partisan as well as nonpartisan political meetings or rallies as a spectator when not in uniform.

b. A member may not—

(1) Use his official authority or influence for the purpose of interfering with an election, or affecting the course of its outcome, or of soliciting votes for a particular candidate or issue, or of requiring or soliciting political contributions from others.

(2) Be a candidate and hold civil office except under the conditions set forth in paragraphs 5–30 and 5–31.

(3) Participate in partisan political management, campaigns, or conventions, including making campaign contributions to a partisan political candidate, to another member of the Armed Forces, or to an employee of the Federal Government.

c. To assist in applying the foregoing general provisions to particular factual situations, appendix A contains representative samples of political activities which are deemed permissible or prohibited. These guidelines do not supersede other related Army regulations dealing with dissident and protest activities among members of the Army, but are to be used in conjunction with them.

d. Appendix B contains a summary of Federal statutes prohibiting certain types of political activities by members of the Armed Forces.

5–30. Candidacy for elective office. *a.* A member of the Army may not campaign as a partisan candidate for nomination or as a partisan nominee for civil office. However, where the circumstances justify, the installation commander may permit the member to file such evidence of his nomination or candidacy for nomination as may be required by law. Such permission shall not authorize activity while on active duty that is otherwise prohibited by paragraph 5–29*b* or paragraph A–2.

b. A member of the Army may not become a nonpartisan candidate for any civil office requiring full-time service while serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receive schooling, or other training wholly or partly at the expense of the United States.

5–31. Release of military personnel elected or appointed to civil office. *a.* Officers on the active

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list of a regular component of an armed force may not hold a civil office, except as otherwise provided by law. The acceptance of such a civil office or the exercise of the functions of the office terminates the officer's military appointment as provided by Title 10 United States Code, Section 973(b).

b. An officer on the active list of a Reserve component of an armed force and enlisted personnel who are elected as a partisan candidate to any civil office or as a nonpartisan candidate to a civil office requiring full-time service, or who are appointed to a civil office requiring full-time service may be retired, discharged, or released to inactive duty, as may be appropriate. However, such officers and members will not be retired, discharged, or released to inactive duty if they are serving an initial tour of extended active duty or a tour of extended active duty that the members have agreed to perform as a condition to receiving schooling, instruction, or other training, wholly or partly at the expense of the United States.

Section IV. MEDICAL CARE

5–32. General. A member of the Army on active duty or active duty for training usually will be required to submit to medical care considered necessary to protect or maintain the health of others, to preserve the member's life, or alleviate undue suffering by the member. A commanding officer may, with the concurrence of the medical treatment facility commander, order the hospitalization of any member of his command or order him to submit to a medical examination when indicated.

5–33. Explanation of term. Medical care as used in this section means preventive, diagnostic, therapeutic, and rehabilitative medical, surgical, psychiatric, and dental procedures.

5–34. Medical care performed with or without the member's permission. Under the following circumstances medical care may be performed with or without the member's permission:

a. Emergency medical care which is required to preserve the life or health of the member.

b. Immunization required by AR 40–562 or other Department of the Army directives (subject to any limitation stated in these directives).

(1) The policy of authorizing forcible immunization is intended to protect the health and overall effectiveness of the command as well as the health of the soldier himself. The individual does not have an option as to whether he will be immunized; this is a military obligation, an exception to which is granted only for medical reasons in accordance with paragraphs 9*a* and *e*, AR 40–562.

(2) In performing this duty, medical personnel are expected to use only that amount of force necessary to administer the immunization. Any force necessary to overcome an individual's reluctance to immunization normally will be provided by personnel acting under orders from the soldier's unit commander. The commonly used expression "refusal to take shots" erroneously suggests that the individual concerned has an option between being immunized or being punished for his refusal. This is incorrect. A soldier scheduled for immunization will routinely be inoculated at his turn, unless he defies superior authority in which event the inoculation will be specially accomplished.

(3) Unless medically contraindicated, any required immunization will be administered to a member with or without his consent. Every reasonable effort should be made to avoid the necessity of disciplinary action. However, a member should be advised that he may subject himself to disciplinary action by resisting, and that he will be inoculated with or without his consent in any event. Additionally, prior to any mandatory immunization, the member should be counseled concerning the many other reasons why he should submit to the required inoculation.

c. Isolation and quarantine for cases of suspected or proven communicable disease, when appropriate.

APPENDIX A

EXAMPLES OF TYPES OF POLITICAL ACTIVITY PERMITTED OR PROHIBITED

A–1. Examples of types of political activity permitted. In accordance with the policies established in paragraph 5–29, a member of the Army on active duty may—

a. Register, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Army.

b. Promote and encourage other military personnel to exercise their franchise, provided such promotion does not constitute an attempt to influence or interfere with the outcome of an election.

c. Join a political club and attend its meetings when not in uniform.

d. Serve in a local part-time nonpartisan civil office, appointive or elective, provided the requirements of the office do not interfere with military duties and the member receives the prior approval of the installation commander.

e. Serve as an election official, provided such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has the prior approval of the installation commander.

f. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Army.

g. Write a letter to the editor of a newspaper expressing the member's personal views concerning public issues, provided those views do not attempt to promote a partisan political cause.

h. Write a personal letter, not for publication, expressing preference for a specific political candidate or cause, provided the action is not part of an organized letter-writing campaign in behalf of a partisan political cause or candidate.

i. Make monetary contributions to a political party or political committee favoring a particular candidate or slate of candidates subject to the limitations of sections 607 and 608 of title 18 United States Code.

j. Display a political sticker on his or her private automobile.

A–2. Types of activities prohibited. In accordance with the statutory restrictions set forth in appendix B and the policies established in paragraph 5–29, a member of the Army on active duty shall not:

a. Use official authority or influence for the purpose of interfering with an election, affecting the course or outcome thereof, soliciting votes for a particular candidate or issue or requiring or soliciting political contributions from others.

b. Be a partisan candidate for civil office, Federal, State, or local, except under the conditions set forth in paragraph 5–30, or engage in public or organized solicitation of others to become partisan candidates for nomination or election to civil offices.

c. Participate in partisan political management or campaigns, or make public speeches in the course thereof.

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d. Make a campaign contribution to another member of the Armed Forces or to a civilian officer or employee of the United States for the purpose of promoting a political objective or cause.

e. Solicit or receive a campaign contribution from another member of the Armed Forces or from a civilian officer or employee of the United States for the purpose of promoting any political objective or cause.

f. Allow or cause to be published partisan political articles signed or authored by the member for the purpose of soliciting votes for or against a partisan political party or candidate.

g. Serve in any official capacity or be listed as a sponsor of a partisan political club.

h. Speak before a partisan political gathering of any kind to promote a partisan political party or candidate.

i. Participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate.

j. Conduct a political opinion survey under the auspices of a partisan political group, or distribute partisan political literature.

k. Use contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present.

l. Participate in the activities and associations listed in AR 604–10, Military Personnel Security Program.

m. Perform clerical or other duties for a partisan political committee during a campaign or on election day.

n. Solicit or otherwise engage in fund raising activities in Federal offices or facilities, including military reservations, for a partisan political cause or candidate.

o. March or ride in a partisan political parade.

p. Display a large political sign, banner, or poster on his or her private automobile (as distinguished from a political sticker).

q. Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by or associated with a partisan political party or candidate.

r. Sell tickets for or otherwise actively promote political dinners and other such fund-raising events.

s. Attend as official representative of the Army, partisan political events even though he does not actively participate.

A–3. Activities not expressly allowed or prohibited. Some activities not expressly prohibited would be contrary to the spirit and intent of this regulation. In determining whether or not an activity violates the traditional concept that military personnel must not engage in partisan political activity, rules of reason and common sense will apply. Any activity that could be interpreted as associating the Department of the Army directly or indirectly with a partisan political cause or candidate must be avoided.

A–4. Nonpartisan political activity. A member of the Army on active duty may participate in local nonpartisan political campaigns. However, a member taking part in local nonpartisan political activity shall not:

a. Wear a uniform while campaigning or use any property or facilities of the Government in the campaign.

b. Allow participation to interfere with or prejudice performance of military duties.

c. Engage in conduct which would in any way imply that the Department of the Army is taking a position or is involved in the campaign.

A–5. Members on active duty for training. Paragraphs 5–29, 5–30, and 5–31 do not apply to members on active duty for training who are serving for a period of not more than 30 days. While on active duty for training, however, a member is expected to—

a. Give full time and attention to the performance of military duties during prescribed duty hours.

b. Avoid any outside activities that would be prejudicial to the performance of military duties or inconsistent with the accepted traditions of the Army.

c. Refrain from participating in any political activity while in military uniform, or using government facilites in furtherance of political activities.

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EXHIBIT D-25A - ARMY REGULATION 360-61, CHAPTER 2

*AR 360-61

ARMY REGULATION
No. 360-61

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, *17 July 1969*

ARMY INFORMATION
COMMUNITY RELATIONS

Effective 1 October 1969

This is a complete revision to comply with revised DOD Directive 5410.18 and DOD Instruction 5410.19 and incorporates changes in policy. Local limited supplementation of this regulation is permitted but is not required. If supplements are issued, Army Staff agencies and major Army commands will furnish one copy of each to Chief of Information; other commands will furnish one copy of each to the next higher headquarters.

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*This regulation supersedes AR 360-61, 6 May 1966, including all changes; DA Memo 360-7, 19 January 1968; DA Letter, AGAM-P (M) (29 Dec 65) CINFO CLD, 10 January 1966, subject: Articles and Items for Defense Industry Bulletin; and rescinds RCS CINFO-3(R3).

EXHIBIT D-25A

CHAPTER 2
POLICY

2-1. General. The policy of the Department of the Army is to support public events in the civilian domain subject to operational and training requirements, budget limitations, and guidelines enumerated in paragraph 2-3.

2-2. Restrictions. *a.* Army participation (and cooperation) is not authorized when such participation may directly or indirectly (indorse or selectively) benefit (or favor), or appear to (indorse or selectively) benefit (or favor) a private individual, group, corporation (whether for profit or nonprofit), sect, fraternal organization, quasi-religious or ideological movement, political group, or commercial venture, or be associated with solicitation of votes in a political election.

(1) For the purposes of this regulation—

(*a*) Providing use of Government facilities, such as transportation, housing, or messing, at Government expense is considered a form of Army participation.

(*b*) Organizations which may not be selectively benefitted or favored include, but are not limited to, religious and sectarian groups; fraternal organizations as the Knights of Columbus, Loyal Order of the Moose, Knights Templar, Order of the Eastern Star, Free and Accepted Masons (Scottish Rite, York Rite and Shrine), Benevolent and Protective Order of the Elks, Fraternal Order of the Eagles, Independent Order of Odd Fellows, and B'nai B'rith; and quasi-religious or ideological movements or organizations as Moral Rearmament, "Sing Out," and "Up With People."

(*c*) Service or luncheon clubs such as the Kiwanis International, Lions International, Optimists, Rotary International, and Toastmasters International are not considered fraternal groups.

(2) The restriction on indorsing or selectivity benefitting private organizations should not be interpreted as barring any group that offers to provide entertainment on base to military personnel, civilian employees, or dependents. However, promotion of the groups' objectives through handouts, speeches, program content, or other forms of promotion in connection with the entertainment, including the period before and after the entertainment, is strictly prohibited.

(3) Participation which supports commercial advertising, publicity, promotional activities or events so as to benefit or favor a commercial venture is not authorized. However, participation in commercially sponsored programs on audio-visual media, is authorized, provided provisions of AR 360-5 are complied with.

(4) Participation is prohibited in any event for which the public is charged admission specifically to observe Army participation. A general admission charge such as in the case of fairs or conventions is not, in itself, a bar against Army participation. However, no additional charge may be made for the public to see Army participation.

(5) Although participation benefitting or appearing to favor a sect is prohibited, support to nationally recognized veterans organizations of religious or racial orientation is authorized when the program to be supported is oriented to the veteran as opposed to sectarian or national origin objectives of the organization. Similarly, support to nonpublic schools is authorized when the participation is clearly in support of educational programs or when it supports ROTC or personnel procurement programs.

b. Participation is prohibited unless admission, seating, and all other accommodations and facilities connected with the event or activity are available to all without regard to race, creed, color, or national origin. Participation is also prohibited in public events when the sponsoring organization or group excludes any person from its membership or functions because of race, creed, color, or national origin.

c. Participation in, or support of, fund-raising events in the United States will be limited to the federated and joint campaigns recognized by the Federal Services Fund-Raising Program. See paragraph 4-18 for detailed guidance.

d. Participation will be limited in scope and type which is appropriate for the occasion, in good taste, and in keeping with the dignity of the Army.

e. For specific policies for each type of participation, see Chapter 4.

2-3. Programing, budgeting and financing.

a. Major commands and agencies will make provisions in their programing, budget estimates, and financing programs for conducting effective community relations programs consistent with the provisions of this regulation, including the budgeting and financing requirements of the program developed by commanders of unified and specified commands. The cost of participating in or furnishing resources for a community relations event will be the responsibility of the major command or agency involved and must be accomplished within financing available to the major command or agency. The financial requirements for these purposes will be kept to the minimum necessary to accomplish the Army objectives set forth herein.

b. Costs of participation normally will be at Government expense for the following types of activities when such participation is in the interest of the Army and when funds are available:

(1) Public observances of national holidays when sponsored by the Armed Forces or civic organizations.

(2) National Veterans Association conventions.

(3) Official civil ceremonies and functions.

(4) Speaking engagements.

(5) Programed, scheduled tours by the U.S. Army Exhibit Unit when, as determined by the Chief of Information, this method is the most effective and economical way of fulfilling public information and community relations objectives of the Department of the Army.

(6) Scheduled tours by such units as the U.S. Army Field Band when appropriated funds are specifically provided for such tours.

(7) Other events considered to be in the national interest, or in the professional, scientific, or technical interests of the Army, when approved by the Secretary of Defense or by an oversea unified or specified commander. The approval of the Secretary of Defense or the unified or specified commander is not required when participation is limited to attendance by individuals as conferees. In this case, the provisions of AR 1-211 will govern.

c. Participation in all other public events normally will be at no additional cost to the Government. Such events will be financed as follows:

(1) The sponsor will reimburse that cost financed from the operation and maintenance appropriation available to the major command or agency furnishing the Government resources. Additional costs normally include, but are not necessarily limited to, travel and transportation of military personnel and equipment; meals and/or lodging or per diem allowances payable under the provisions of the Joint Travel Regulations; and the transportation, handling, and cost of aviation fuel if such fuel is not available at military contract price at the staging base.

(2) Other services, when required by the nature of the event, will be provided by the sponsor as follows:

(*a*) Ground transportation between an airport and the event, unless within a local installation's community relations area as defined in paragraph 1-3*c*.

(*b*) Rental space, utilities, and custodial services.

(*c*) Public liability and property damage insurance for aerial demonstrations and on specific occasions, Army exhibits.

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(*d*) Such other services determined necessary by the Army element participating in the event and agreed to be provided by the sponsor.

(3) Continuing-type costs to the Government, which would have existed had the Army not participated in the event, will not be reimbursed by the sponsor. Examples of such costs are regular pay and allowances, small incidental expenses of an installation such as local transportation and telephone calls, fuel used in aircraft participation conducted as part of training, and such other minor expenses as may be determined by the commander concerned.

EXHIBIT D-26A - ARMY REGULATION 670-5, PARAGRAPH 1-1 AND 1-2

*AR 670-5

ARMY REGULATION
No. 670-5

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C., *8 January 1971*

UNIFORM AND INSIGNIA

MALE PERSONNEL

Effective 1 March 1971

This is a complete revision of AR 670-5 and changes are made throughout. Local limited supplementation of this regulation is permitted but is not required. If supplements are issued, Army Staff Agencies and major Army commands will furnish one copy of each to Commanding General, U.S. Army Materiel Command, ATTN: AMCDT-DP; other commands will furnish one copy of each to the next higher headquarters.

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* This regulation supersedes AR 670-5, 1 May 1965, including all changes; DA message DCSPER-PSD 011918Z Apr 70 (U), subject: Wear of Special Skill Badges on the Utility Cap; and DA message DCSPER-PSD 271940Z May 70 (U), Subject: Provisions for Wear of the Uniform; and DA message DCSPER-PSD 172825Z Dec 70 (U), subject: Wear of Service Stripes.

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CHAPTER 1
GENERAL

1-1. Purpose. This regulation prescribes the authorized material, design, ornamentation, insignia, accessories, manner, and occasion for the wearing of the uniform by male personnel of the U.S. Army. Only uniforms and items prescribed herein, or as issued, will be worn. Personnel who wear the uniform will be held responsible for conformity to regulations. Wear of optional uniform items will be at the option of the individual and commanding officers will not require the purchase of unauthorized or optional uniform and insignia items unless specifically directed otherwise by Headquarters, Department of the Army. Except as otherwise prescribed, this regulation applies to all male military personnel of the Army except Generals of the Army; the Chief of Staff, U.S. Army; and former chiefs of staff, each of whom may prescribe the articles of uniform for his wear.

1-2. Wearing of uniform. *a.* The uniform will be worn when on duty by all male Army personnel in an active duty status except when special Department of the Army authority to wear civilian clothes on duty is granted. Military personnel accompanying U.S. Army forces in the field and normally authorized by Army regulation to wear civilian clothing on duty for security reasons will wear the insignia described in paragraph 14-46*a* in lieu of insignia of grade or branch on the service or field uniform.

b. The Army uniform will not be worn when engaged in off-duty civilian employment except as provided in paragraphs 3-2 and 3-3.

c. Installation commanders will prescribe the wearing of the winter or summer service uniforms in conformance with AR 670-6.

d. The wearing of combinations of various articles of the uniform other than combinations prescribed by regulations and by tables of allowances is prohibited.

e. Except when specifically prohibited, uniform items changed in design or material may continue to be worn until no longer serviceable.

f. The wearing of the uniform of any of the Armed Forces is prohibited under any of the following circumstances:

(1) At any meeting or demonstration which is a function of, or sponsored by any organization, association, movement, group, or combination of persons which the Attorney General of the United States has designated as totalitarian, fascist, Communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means.

(2) During or in connection with the furtherance of private employment or commercial interests when an inference of official sponsorship for the activity or interest would be drawn.

(3) Under circumstances which would tend to bring discredit upon the Armed Forces.

(4) Under such circumstances as may be specified and published by the Secretary of the military department concerned.

(5) Except when authorized by competent service authority, when participating in activities, such as public speeches, interviews, picket lines, marches, rallies, or any public demonstration (including those pertaining to civil rights), which may imply service sanction of

Exhibit D-26A - Army Regulation 670-5, Paragraph 1-1 and 1-2

the cause for which the demonstration or activity is being conducted.

g. For retirement ceremonies see paragraph 3–8.

1–3. Wearing of civilian clothing. *a. CONUS.* Civilian clothing may be worn when off duty unless such wear is prohibited by the commanding general of a CONUS army, or the Commanding General, Military District of Washington, U.S. Army.

b. Overseas. Oversea commanders may authorize the off-duty wear of civilian clothing in areas within their command when deemed advisable.

1–4. Uniformity of material. *a.* When an individual exercises his option to choose among various fabrics authorized for the uniforms, he must be consistent so that the coat (or shirt when worn as an outer garment) and trousers are of the same type material. Garrison caps of Army Green shades 44 and 344 may be worn interchangeably with uniforms of either shade.

b. Wherever gold lace or gold bullion ornamentation and stripes are prescribed for wear with uniforms in this regulation, gold color nylon or rayon may be substituted subject to the following limitations:

(1) If trouser and sleeve ornamentation is gold bullion, cap decoration and shoulder strap insignia must be bullion.

(2) If trouser and sleeve ornamentation is of synthetic material, cap ornamentation and shoulder strap insignia may be of either bullion or synthetic material.

(3) Ornamentation on visor of Army Green service cap will be of gold bullion or anodized aluminum of 24 karat gold color at option of purchaser.

1–5. Wearing of civilian decorations and jewelry. No jewelry, watch chains, or similar civilian items will appear exposed on the uniform. The wear of a personal wrist watch, identification bracelet or ring is authorized as long as the style is conservative and in good taste. The wear of a purely religious medal on a chain around the neck is authorized as long as it is not exposed. The wear of a fad device, a vogue medallion, a personal talisman or amulet when in uniform or on duty is forbidden. Any item of personal wear that has disruptive, moral or social overtones whether basically an accepted item of wear may be declared an unauthorized item by the responsible unit commander. The only civilian decorations or ribbons which may be worn on the uniform are as authorized by AR 672–5–1.

1–6. Wearing of identification tags, security identification badges, nameplates, and nametapes. *a. Tags, identification.* Identification tags will be worn by each member of the Army at all times when in the field, when engaged in field training, when traveling in aircraft, or when outside the continental limits of the United States.

b. Badges, security identification. Security identification badges or cards may be worn in restricted areas as prescribed by the commanding officer. Wear of security badges outside of restricted areas is prohibited.

c. Plate, name. Nameplates will be worn on the uniform when prescribed by the commanding officer. When prescribed, they will be provided without cost to the individual (CTA 50–901). Costs incurred in this connection are chargeable to OMA funds. Plates will conform to the following:

(1) *Size.* 1 by 3 by $\frac{1}{4}$ inches (may be longer in case of lengthy names).

(2) *Color.* Jet black background, with white border not to exceed 1/32 inch in width.

(3) *Material.* Laminated plastic, nonglossy finish.

(4) *Lettering.* White, indented, block-type lettering $\frac{3}{8}$ inch in height and centered on the plate. Use last name only.

(5) *Attachment.* Clutch back.

(6) *Placement.* To be worn on the flap of the right breast pocket, centered between the top of the button and the top of the pocket.

d. Tapes, name. A nametape will be worn on each item of utility and field clothing on which

EXHIBIT D-33A - FORT DIX REGULATION 210-26

United States of America

DEPARTMENT OF THE ARMY

Fort Dix, NJ (PLACE) 13 Jan 73 (DATE)

I HEREBY CERTIFY that the attached document is a true copy of Ft Dix Regulation 210-26, Installations - Demonstrations, effective 9 April 1968.

JAMES J. RECA
CW2, USA
Act Asst AG

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, , Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this day of , 19

Secretary of the Army.

By
Administrative Assistant.

DA FORM 1 MAR 66 4 REPLACES EDITION OF 1 OCT 47, WHICH WILL BE USED.

EXHIBIT D-33A

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Exhibit D-33A - Fort Dix Regulation 210-26

DEPARTMENT OF THE ARMY
HEADQUARTERS US ARMY TRAINING CENTER, INFANTRY
Fort Dix, New Jersey 08640

REGULATION NUMBER 210-26

9 April 1968

Office of the Staff Judge Advocate
Fort Dix, New Jersey

INSTALLATIONS

DEMONSTRATIONS

1. PURPOSE:

This regulation establishes policy concerning demonstrations, picketing, protest marches and similar activities on the Fort Dix Military Reservation.

2. PROHIBITED PRACTICES:

a. Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation.

b. No one shall enter on this installation for any of the purposes prohibited by this regulation and such entry will constitute a violation of Title 18, United States Code, Section 1382, which provides in part that ... "whoever, within the jurisdiction of the United States, goes upon any military ... reservation, post, fort, arsenal, yard, station or installation, for any purpose prohibited by law or lawful regulation ... shall be fined not more than $500.00 or imprisoned not more than six months, or both."

3. RESPONSIBILITIES:

Any individual having knowledge of a violation of this regulation will contact the Provost Marshal as expeditiously as possible.

FOR THE COMMANDER:

(AHBOGA)

OFFICIAL:

R. ST. PIERRE
LTC, AGC
Asst AG

DAVID A. GILE
Colonel, GS
Chief of Staff

This regulation supersedes Regulation 210-26 (0), this headquarters, 20 September 1967, subject: Demonstrations.

EXHIBIT D-34A - FORT DIX REGULATION 210-27

United States of America

DEPARTMENT OF THE ARMY

Fort Dix, NJ (PLACE) 18 Jan 73 (DATE)

I HEREBY CERTIFY that the attached document is a true copy of Fort Dix Regulation 210-27, Unauthorized Publications and Petitions, effective 14 December 1970.

JAMES J. RECA
CW2, USA
Act Asst AG

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, , Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this day of , 19

Secretary of the Army.

By
Administrative Assistant.

DA FORM 1 MAR 66 4 REPLACES EDITION OF 1 OCT 62, WHICH WILL BE USED

EXHIBIT D-34A

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Office of the Staff
Fort Dix, New Jersey

Exhibit D-34A - Fort Dix Regulation 210-27

DEPARTMENT OF THE ARMY
HEADQUARTERS US ARMY TRAINING CENTER, INFANTRY, AND FORT DIX
Fort Dix, New Jersey 08640

REGULATION
NUMBER 210-27

14 December 1970

INSTALLATIONS

UNAUTHORIZED PUBLICATIONS AND PETITIONS

1. PURPOSE: This regulation establishes policy concerning the distribution or posting of handbills, circulars, pamphlets and other writings or publications of any nature and the circulation of petitions on the Fort Dix Military Reservation.

2. PROPER PRACTICES: The distribution or posting of handbills, circulars, pamphlets or other writings or publications issued by commanders and staff agencies relating to the performance of their respective missions is authorized.

3. PROHIBITED PRACTICES:

a. The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies other than those set forth in paragraph 2, above, and paragraph 5, below, is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters.

b. The circulation on Fort Dix of any petition for signature of any person, military or civilian, assigned to, working at or located on Fort Dix, New Jersey, by any person, is prohibited without prior written approval of the Adjutant General, this headquarters.

c. No one shall enter this installation for any of the purposes prohibited by this regulation, and such entry will constitute a violation of Title 18, United States Code, Section 1382, which provides in part that "...whoever, within the jurisdiction of the United States, goes upon any military reservation, post, fort, arsenal, yard, station or installation, for any purpose prohibited by law or lawful regulation...shall be fined not more than $500.00 or imprisoned not more than six months, or both."

4. RESPONSIBILITIES:

a. Any person having knowlege of a violation of this regulation will immediately report the incident to his commanding officer or supervisor for appropriate action.

This regulation supersedes Regulation 210-27, this headquarters, 30 April 1970, subject: Unauthorized Publications and Petitions.

b. When the offender is a civilian, the incident will be reported to the Provost Marshal for disposition.

5. ADMINISTRATIVE INSTRUCTIONS:

a. Fort Dix Regulation 210-6 controls the issuance of authorizations for the conduct of business by private concerns on this reservation. Individuals not specifically covered within the cited regulation will be referred to the Adjutant General, this headquarters.

b. Fort Dix Regulation 600-1a governs fund-raising activities on the reservation.

c. AR 210-20 and DA Pamphlet 20-3 govern the operation of the Special Services Army Library Service.

d. Persons requesting information about the sale or distribution of commercial magazines or commercial newspapers should be directed to the Post Exchange officer.

e. AR 360-81 governs the publication of Armed Forces newspapers internally or by civilian enterprise publications.

f. This regulation does not apply to publications of nonappropriated funds, unit funds and private associations which have been established in accordance with applicable Army regulations.

(Added)

FOR THE REMINDER:

OFFICIAL:

JAMES W. LOVE
Colonel, GS
Chief of Staff

C. W. GABORIK
Major, AGC
Deputy AG

DISTRIBUTION: (DL 70)
A

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QUESTION PRESENTED

Are the areas of Fort Dix in which the court of appeals upheld exercise of First Amendment rights by civilians "open to the public" pursuant to the standards established in *Flower v. United States*, 407 U.S. 197?

STATEMENT OF THE CASE

The procedural history and facts of the case are fully summarized in the two opinions of the court of appeals (App. B, 10a-13a, 21a-29a; App. H, 48a-50a).[1]

1. "App. [A, B, C, D, E, F, G, or H]" is used herein to refer to appendices A through H attached to the Petition. "App." is used herein to refer to the appendix filed in the court of appeals.

REASONS FOR DENYING THE WRIT

I. The Questions Raised by Petitioners Are Not Presented by This Case, and the Questions That Are Presented by This Case Do Not Merit Granting the Writ.

The essence of Respondents' (plaintiffs below) claim, and the basis on which it was upheld by the court of appeals, is that civilians may exercise First Amendment rights (subject, of course, to reasonable regulation of the time, place, and manner) on the portions of military bases that are "open to the public" pursuant to this Court's decision in *Flower v. United States*, 407 U.S. 197. Plaintiffs did not question, and do not now question, the authority of the military to close any or all of its bases to the public or to prohibit entry as well as exercise of First Amendment rights by civilians on a closed base or a closed portion of a base. Nor did plaintiffs seek, or the court of appeals decide, to broaden the scope of this Court's decision in *Flower*.

Respondents' claim was based, as was this Court's decision in *Flower*, on the general principle that in government controlled areas to which the public is granted free and open access, the Government may not prohibit all First Amendment activities or selectively prohibit such activities based on content. E.g., *Lovell v. Griffin*, 303 U.S. 444; *Schneider v. State*, 308 U.S. 147; *Murdock v. Pennsylvania*, 319 U.S. 105 ("dissemination of views may not be suppressed because they are unpopular, annoying, or distasteful"); *Jamison v. Texas*, 318 U.S. 413, 416 ("[o]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion"); *Edwards v. South Carolina*, 372 U.S. 229; *Tinker v. Board of Education*, 393 U.S. 503; *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 ("once a forum is opened up to assembly or speaking by some groups, the government may not prohibit others from assembling or speaking on the basis of what they say").

Petitioners do not argue that *Flower* is not controlling (they seem to concede that it is controlling, Petition, at 15-17). Nor do they offer any reasonable factual basis for distinguishing *Flower* or ask the Court to reconsider or overrule *Flower*. Rather, Petitioners have framed the issues in a broad, distorted fashion and have thereby sought to convince the Court that there are conflicts between the decision of the court of appeals (and presumably, *Flower*) and recent decisions of this Court.[2] However, there are no such conflicts; most of the issues raised by Petitioners are simply not presented by this case and were not considered or resolved by the court of appeals. We are not here concerned with: (1) a closed, maximum security military installation, as in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886,[3] a decision rendered before *Flower*; (2) a privately owned and controlled area, as in *Lloyd Corp. v. Tanner*, 407 U.S. 551; (3) the duties and First Amendment rights of military personnel, as in *Parker v. Levy*, 417 U.S. 733; (4) the rights of news reporters and prisoners concerning interviews of inmates in closed, guarded prisons, as in *Pell v. Procunier*, 417 U.S. 817 and *Saxbe v. Washington Post*, 417 U.S. 843; or (5) the problem of First Amendment activities directed at a "captive audience," as *Lehman v. City of Shaker Heights*, 418 U.S. 298.[4] The primary, if not only, question presented by this

2. For example, the issues are framed by Petitioners as if Respondents sought and were granted exercise of First Amendment rights on a military base without regard to whether or not the base or a portion thereof is maintained, by military choice, as an open, public area. Their statement of the issues presented does not mention or consider the whole question of the openness of the base,, Petition, at 2, and it is hardly discussed in the remainder of the Petition.

3. This Court described that installation as follows: "Access to it was restricted, and guards were posted at all points of entry. Identification badges were issued to persons authorized to enter . . .;" the installation was working on "weapon systems of a highly classified nature." 367 U.S. at 887. Moreover, that decision concerned the due process rights of a civilian employee.

4. Fort Dix covers 55 square miles in which military and civilian personnel can move unhindered and unrestricted except

case is whether the portions of Fort Dix in which plaintiffs have been granted First Amendment rights are "open to the public" pursuant to *Flower*.

In the following sections, we argue that: (1) the portions of Fort Dix in which plaintiffs were granted First Amendment rights are quite clearly "open" pursuant to *Flower*, as the court of appeals determined based on an extensive, complete record; (2) there is no conflict in the lower courts concerning either the principles upon which *Flower* was based or application of the standards set out therein, and this Court's mandate in *Flower* is being carefully carried out with due regard for military interests and security; (3) Petitioners' other objections which are presented by this case—concerning mainly the potential for disruption and the political neutrality of the military—were considered and resolved by this Court in *Flower*, and, moreover, should be deemed to have been waived.

II. The Decision Below Rests on the Particular Facts of This Case as Determined by the Court of Appeals Based on an Extensive, Complete Record.

The record quite clearly demonstrates that the areas of Fort Dix in which the court of appeals has protected civilian exercise of First Amendment rights are open to the public under the standards set out in *Flower*. Indeed, the evidence presented by plaintiffs—which was unrebutted[5]—shows that Fort Dix is essentially indistinguishable from the surrounding area in New Jersey except that it is controlled by military rather than civilian authorities.

At the initial evidentiary hearing, eight witnesses testified on behalf of the plaintiffs, including two colonels,

Note 4—*Continued*
in certain small areas; of the 28,000 people officially on the base, presumably the audience Petitioners believe is "captive," 150 to 200 people attended plaintiffs' rally held on a small parking lot.

5. Petitioners did not present any testimony but relied on the testimony of two colonels discussed *infra* and on two affidavits by base officials that are in accord with that testimony.

responding to a subpoena of General David or his representative, and a private presently training at the base. The colonels were Jasper R. Johnson, Director of Personnel and Community Activities, and Vincent I. Olsen, Provost Marshal. Except where noted, the references to testimony made in the following discussion are references to the testimony of the two colonels.

Access to Fort Dix is freely open to the public. Except in a few small restricted areas, where First Amendment rights were not claimed (App. 87a), civilians can pass through, visit, tour the base, walk around, ride around, talk to military personnel, eat at the cafeteria—all without being questioned, stopped, or hindered in any way (App. 77a-79a, 69a). The base is crisscrossed by New Jersey state and county roads that are civilian thoroughfares (App. 79a, 97a).[6] Public buses freely enter and leave the base, picking up and leaving civilians, without being monitored or controlled (App. 79a-81a). Military personnel can, in their off-duty time,[7] read books, newspapers, and other periodicals, which are readily available in a library and at stores, watch television (there is one in each barracks), listen to radio, play sports, or just relax (App. 37a-38a, 66a-68a). These materials and media contain partisan and varied viewpoints, including viewpoints opposed to the Indo-China War, and discussion of them is "quite common." (App. 38a, 67a-78a). The *Army Times*, a newspaper generally available on the base, contains partisan material; the October 5, 1972 issue, introduced into

6. Petitioners state that " 'No Trespassing' signs are conspicuously posted" on the roads to distinguish *Flower*. Petition, at 16. Earlier in their Petition, they more accurately discuss these signs: " 'No Trespassing' signs are posted along the one state highway." Petition, at 7. There are ten highways, all of which are open, and there are some "No Trespassing" signs on a portion of one of them (not in the areas where Respondents exercised or sought to exercise First Amendment rights). There are also "Visitors Welcome" signs on some of the main entrances to the base (see Exhibits P-3A through P-11A).

7. They have off-duty time in the evenings and on weekends. It increases as the training period progresses.

evidence below as Exhibit P-7, had a full page ad urging the re-election of President Nixon that Col. Johnson found "very partisan." (App. 43a).

Moreover, civilians are allowed to address various sized gatherings of military personnel and their dependents on a wide variety of topics. Businessmen come to speak to soldiers about business management principles (App. 57a-58a). Up to 500 listen to religious talks at the chapel (App. 58a). People from the surrounding community come in to discuss "emergency preparedness." (App. 59a). Civilians address gatherings of 50 soldiers about drug abuse. (App. 57a, 59a-60a). There are even rock music concerts open to civilians attended by as many as 5,000 people (App. 55a). Civilians visit fairly regularly to convey various types of information. (App. 60a).

The civilian witnesses supplemented the testimony of the colonels with their own experiences on the base. Dina Portnoy, who worked in Wrightstown, New Jersey, went on the base, without being stopped or questioned, about three times a week to the barracks, the cafeteria, etc.[8] (App. 110a-112a). She also regularly used the state and county roads running through the base, including New Jersey Route 68 and Texas Avenue, as thoroughfares to get from Wrightstown to a friend's home in Browns Mills, New Jersey. Sidney Stapleton rode and walked around the base for a few hours on October 5, 1972 (App. 120a-124a). He ate at the cafeteria, bought newspapers (including the issue of the *Army Times* discussed *supra*), and went to barracks. He stopped at one entrance to the base and counted fifty-three non-military vehicles (without decals) going in and out in fifteen minutes; most of the traffic was non-military. A soldier on duty at an information booth gave him information which led him to believe the base is open to access by the public. (App. 124a). Finally, Donald Campbell, a private in training at the base, testified that there is leisure time, during which he read four books in

8. Her civilian co-workers attended movies at the base theatre (App. 1112-112a).

the last three weeks, and that the soldiers have time to hear addresses by candidates. (App. 132a-139a). Furthermore, he testified that during his orientation period at the base, he and the other soldiers were told by their sergeants that the base is open and that it is dangerous at night because so many civilians freely enter the base. (App. 136a).

The further evidence presented at the final hearing, though mainly concerned with the jurisdictional amount issue,[9] made the openness of the base even clearer[10] and included evidence concerning the campaign rally.

Leaflets announcing the rally were distributed throughout the open areas of the base without even a minor incident. (App. 237a-38a). The person in charge of the leafletting described the reception given the leafleteers as "warm" (App. 237a). The rally, held on a Saturday afternoon, was attended by 150 to 200 persons, including about 60 to 75 civilians (App. 237a-38a, 255a). Colonel Olsen was asked if there was "any trouble" at the rally, and he responded, "None that I recall." (App. 257a). The court then asked him if there were any "disturbances," and he testified, "None whatsoever." (App. 258a).

9. Petitioners strenuously argued in the courts below that violation of First Amendment rights could never satisfy the jurisdictional amount requirement in 28 U.S.C. §1331, a position that could have the effect of barring any suits to redress deprivation of First Amendment rights by federal officials. Petitioners' position was rejected in the court of appeals (App. H, 52a-55a), and they have not raised the issue in this Court.

10. Several pictures of the base were introduced showing its openness and similarity to an ordinary community with public roads, civilian traffic, and pedestrians. Exhibits P-1A and P-2A show Respondents Ginaven and Misch handing out booklets on the rights of servicemen just before they were arrested just inside the base. They were on the main road through Wrightstown, New Jersey just past the center of the city. Exhibits P-3A through P-11A show various open areas of the base, including pictures of a shopping center, bowling alley, civilians buying pretzels at a stand, various signs (including "Visitors Welcome"), civilian buses and cars, and visitor parking and information areas.

The court of appeals concluded:

> The record establishes that Fort Dix, a reservation of over fifty-five square miles, is crossed by ten paved roads, including a major state highway, Route 68, on all of which unrestricted vehicular traffic, civilian as well as military, is permitted at all times. . . . Buses, operated as common carriers, use the roads on the base. They pick up and discharge passengers, civilian and military. Civilians are authorized on the post. There are numerous employed civilians. Business concessions are conducted on the post. Civilians are welcome to visit soldiers. Tourists are welcome. Entertainments are occasionally provided at which as many as 5,000 people may congregate at a sports arena on the post. . . . One can visit the post for any reason at all, or no reason at all, except apparently, to campaign for political office or to distribute unapproved leaflets. The gate at which candidates Spock and Pulley were stopped is on the Wrightstown Road, about five feet from the commercial district of Wrightstown. It is normally open and unguarded, but was apparently guarded by representatives of defendant David on September 23, 1972, in anticipation of the visit. A traffic count taken in 1970, the most recent available, disclosed a daily vehicle count of 66,000 vehicles. . . . Fort Dix, when compared to Fort Sam Houston, is *a fortiori* an open post." (App. B, 22a-24a)

II. There Is Absolutely No Conflict Among the Lower Courts Concerning the Appropriateness of the *Flower* Decision or Its Meaning and Application.

There is absolutely no dispute among the lower courts as to the appropriateness of the *Flower* test or its meaning and application. It has been uniformly followed in every district and circuit court presented with the issue, with the result depending on the particular facts of each case. In addition to the instant case, see *United States v. Floyd*, 477 F.2d 217 (10th Cir. 1973); *Burnett v. Tolson*, 474 F.2d 877 (4th Cir. 1973); *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D. Calif. 1972); *Jenness v. Forbes*, 351 F.Supp. 88 (D.R.I. 1972). See also *McGraw v. Farrow*, 472 F.2d 952 (4th Cir. 1973).

In *Burnett v. Tolson, supra*, the Fourth Circuit found that Fort Bragg is open to the public, with civilians having free access to shopping areas, the post exchange, and motion picture theatre, and that the plaintiffs therefore had a right to "enter the public areas of Fort Bragg as leafleteers." 474 F.2d at 881.

The Tenth Circuit, in *United States v. Floyd, supra*, held that Tinker Air Force Base was "closed" pursuant to the test in *Flower*. Tinker was posted with a large sign which reads as follows:

> "WARNING
> U.S. AIR FORCE BASE
> IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE COMMANDER TINKER AIR FORCE BASE WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH." 477 F.2d at 223

Five security guards were posted at the entry, and a fence surrounded the entire installation.

In *Jenness v. Forbes, supra*, which involves virtually identical facts and many of the same parties as the instant case, the district court distinguished between the portions of the base which were "open to the public," in which plaintiff candidates were allowed to campaign, and "closed" areas, in which plaintiffs' claims were denied. The open areas included portions of the base outside a barbed wire perimeter fence; access was denied to the portion of the base inside the fence, which could only be entered through four gates, all of which were manned by armed sentries charged with permitting only authorized personnel to pass.

On plaintiffs' motion for reconsideration in that case, the district court entered a supplemental opinion holding that plaintiffs must be allowed to campaign on any portion of the base, subject only to reasonable regulation as to time, place, and manner. The earlier decision was modified because the court ruled that the military had waived its objections when, after the court's initial decision, the Department of Defense approved a campaign visit to the base by then Vice-President Spiro Agnew.[11] 351 F.Supp. at 98-100.

The decisions of the lower courts demonstrate an appropriate regard for military interests and security and a clear uniformity and consistency with the decision of the court of appeals in this case and with this Court's mandate in *Flower*.[12]

11. This is discussed further in Point IV, *infra*.

12. Petitioners suggest an interpretation of *Flower* that is not supported in any of the decisions (except the initial decision of the district court in this case, App. A, 7a-8a) and is not merited by the language this Court used. Without negating the presence in this case of the factors set out in *Flower*, Petitioners challenge the court below's application of *Flower* by urging that the term "abandon" in *Flower* be interpreted to mean literal abandonment, i.e., leaving property unattended and uncontrolled with the intent to relinquish all rights with regard to it, and that no base is "open" that is not abandoned in that sense. First, nothing in the *Flower* record even suggests an abandonment in that sense as to Fort Sam Houston. The street where Flower was arrested was part of the base and was so marked. Moreover, the arrests of Flower *by military police* on two occasions (for leafletting) quite clearly indicate that Fort Sam Houston was being patrolled by the military and that the military was exercising control over the base.

In any event, it is clear that the Court did not use "abandon" in that sense. The term was used immediately after the listing of the factors concerning public access, as follows:

> "Under such circumstances [the factors listed] the military has abandoned *any claim that it has special interests in who walks, talks, or leaflets on the avenue.*" 407 U.S. at 198 (emphasis added).

What was "abandoned" was not the property rights of the military but the right of the military to prohibit exercise of First Amendment rights.

IV. Petitioners' Other Objections to the Decision of the Court of Appeals That Are Presented by This Case Were Resolved in *Flower* and, in Any Event, Should Be Deemed to Have Been Waived by the Department of Defense When It Approved a Campaign Visit and Press Conference at the Quonset Naval Base by Major Party Candidates.

Petitioners object to the decision of the court of appeals on a variety of additional grounds that boil down to two basic concerns: that leafletting and campaigning by civilians on even an open base might (1) compromise the "political neutrality" of the military and (2) interfere with the military mission. Both of these concerns formed the basis of the decision by the Fifth Circuit in *Flower*, which was reversed by this Court.[13]

Allowing various views to be expressed and heard does not constitute support of those views or a violation of political neutrality. If Petitioners' view of neutrality were accepted, then federal, state, and local authorities would be considered partisan every time they allowed anyone to exercise any First Amendment rights. To the contrary, neutrality—which Respondents wholeheartedly support—means allowing issues to be aired and conflicting views on them to be expressed.

Moreover, if allowing the views of political candidates, or others, to be heard constitutes a violation of neutrality, then it had already been violated at Fort Dix by Petitioners' allowing wide and open distribution of *some* partisan

13. The majority in the Fifth Circuit held that the Fort Sam Houston regulations prohibiting First Amendment activities, which are almost identical to the Fort Dix regulations, were "reasonable" to "maintain order and discipline," 452 F.2d at 85, and to prevent interference with the "military mission," *id.* at 86. Moreover, that majority said:

> ". . . on base distribution of materials through unauthorized distribution outlets could wrongfully imply that their contents had been approved and were expression of Army policy." *Id.* at 85.

materials and views. The unrebutted evidence showed that television, radio, magazine and newspaper coverage of the partisan views and activities of the major party candidates was widely and openly available to military personnel and civilians on the base, including the materials in *Army Times* discussed *supra*. It is untenable—and impermissible—for military authorities to raise "neutrality" as a bar to airing minority views when in fact they assist in publicizing the views of majority party candidates. Such discrimination against minority parties and candidates for political office violates rights this Court has determined to be "among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30. See also *Mills v. Alabama*, 384 U.S. 214, 218-19; *Dunn v. Blumstein*, 405 U.S. 330; *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51. The court of appeals in this case said:

> "The record discloses that the military permits the circulation and distribution in Fort Dix of a wide range of newspapers and magazines, and that radios and televisions are available during off-duty hours. Thus the persons living in Fort Dix are exposed to the political ideas of those candidates whose campaigns are prominent enough or well-financed enough to attract widespread media coverage. In these circumstances the antisepsis of Fort Dix Regulations Nos. 210-26 and 210-27 is hardly a neutral antisepsis. What the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough nor sufficiently well-financed to attract media coverage, and who must make do with the more old fashioned face-to-face style of campaigning. Such a feigned neutrality serves no discernable military purpose, and cannot outweigh the first amendment rights of the minor candidates." (App. B, 28a-29a).

The claim that exercise of First Amendment rights by civilians would interfere with the military mission seems to involve two kinds of interference. First, Petitioners seem

to say it could "interfere" because Respondents' views are contrary to theirs concerning the War in Indo-China, because of the content of Respondents' speech and leaflets (App. 57a, 72a-73a, 82a-83a, 93a-94a). For example, Colonel Johnson was asked:

> ". . . isn't it true that the content of what a proposed visitor intends to say is the basis for whether he is allowed to come on or not? If, for instance, he says, 'I intend to urge the soldiers not to use drugs,' that, from what you have said, would be something that the Base might favorably look on. If he is going to inform them of some management principle that they are not aware of—
>
> A. That would further our mission, yes.
> Q. But if they are to speak against the war in Vietnam—
> A. That certainly wouldn't forward our mission, would it?
> Q. So the content of what they are to say, that is the basis of whether or not they are approved?
> A. Yes, to a great extent." (App. 73a).

Similarly, newspapers (App. 93a-94a) and leaflets (App. 82a-83a) are approved or disapproved on the base according to their content. Col. Olsen testified that a newspaper not on the "approved" list has to be submitted for approval before it can be sold at base stores (App. 93a-94a). "If it's a paper that is wrong," it will not be approved (App. 94a).

The other kind of "interference" involves possible disruption. (App. 38a, 44a, 46a, 49a). Since the concern here is with areas that the military has decided will be maintained essentially like civilian areas. Petitioners really object not only to Respondents' claims but also to the whole idea of freedom of speech, to the First Amendment. The First Amendment constitutionalizes the judgment that speech is worth its "price" and the wisdom that more disruption results from the suppression of dissent than from

its airing. In any event, disruption can be minimized—as it is by federal, state, and local authorities throughout the country—by reasonable regulation of the time, place, and manner of exercise of First Amendment rights. And Petitioners are very willing to tolerate far greater disruptions, like a rock concert with 5,000 civilians and military personnel attending, for purposes of which they "approve."[14]

Neither the alleged neutrality of the military nor the fear of disruptions seems, under this set of facts, to be genuine. But even if these were genuine considerations, they would hardly amount to a permissible basis for the kind of discrimination and prohibition of First Amendment activities practiced by Petitioners.

Finally, we believe, as the court held in *Jenness v. Forbes, supra,* that Petitioners should be deemed to have waived these objections. After an extended litigation in *Jenness* concerning exercise of First Amendment rights by civilians (many of whom are Respondents in this case) on Quonset Naval Base, the court determined that one portion of the base, located outside of a wire fence, was open and that the civilian plaintiffs could therefore exercise First Amendment rights there but not on the rest of the base. Only three days after the court's decision, the base commander, with the approval of the Department of Defense, allowed then Vice-President Agnew and the Republican candidates for senator, governor, and attorney general of Rhode Island to make a campaign appearance attended by military personnel and hold a news conference on the base. A request by the Vice-President's staff that the press be allowed on the base for the event was honored. Vice-President Agnew's statements, including criticisms

14. Petitioners raise a related question concerning the possibility that military personnel may attend speeches in uniform in violation of military regulations. If military personnel violate valid military regulations concerning speeches or any other activity, the military has the power and ample means to discipline them. This is hardly a basis for prohibiting speeches.

of the Democratic candidate for vice-president and a former Democratic attorney general, were fully covered and reported in the press.

The district court drew the following conclusions from these events, conclusions which we believe apply as well in the instant case:

> "This incident constitutes a waiver of the argument that a significant security interest supports the prohibition on political speech. The Commander felt that there was no threat to the security of the base in allowing entry to four Republican candidates. It must follow that there is no security threat in allowing entry to two minority party candidates and their workers.
>
> • • •
>
> "The Agnew visit poignantly emphasizes the validity of plaintiffs' argument that they, as minority party members, are denied access to channels of communication available to the two major parties, richer in resources of wealth, connections, and prestige. They must, plaintiffs argue, rely on face to face campaigning. Yet defendants would deny them even this morsel of campaign techniques, while making it available to major party candidates who need it less. The First Amendment does not allow the hypocrisy of defendants' 'political neutrality.'
>
> • • •
>
> "There are no constitutionally permissible distinctions that may be drawn between plaintiffs and the Republican candidates that would justify this discrimination against plaintiffs. It is impermissible to base the discrimination on their minority group status. Williams v. Rhodes, *supra*. It is impermissible to base the discrimination on the presumed content of their speech. Police Department of the City of

Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L.Ed. 2d 212 (1972).

* * *

". . . Any meaningful military interest in enforcing the prohibition against plaintiffs has either been waived or, in reality, just does not exist." 351 F. Supp. at 100-101.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 74-848

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS U. GREER, COMMANDER, FORT DIX MILITARY RESERVATION, ET AL., PETITIONERS

v.

BENJAMIN SPOCK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the district court on respondents' motion for a preliminary injunction (Pet. App. 1a–8a) is reported at 349 F. Supp. 179. The opinion of the court of appeals on appeal from the denial of a preliminary injunction (Pet. App. 9a–32a) is reported at 469 F. 2d 1047. The district court's final opinion (Pet. App. 39a–43a) is unreported. The final opinion of the court of appeals (Pet. App. 47a–55a) is reported at 502 F. 2d 953.

[1] Major General Thomas U. Greer has succeeded Major General Bert A. David as the Commander of Fort Dix.

JURISDICTION

The judgment of the court of appeals (Pet. App. 56a) was entered on August 14, 1974. By orders entered November 1, 1974, and December 3, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to January 11, 1975. The petition was filed on January 10, 1975, and granted on April 14, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment requires the commanding officer of the Fort Dix Military Reservation to allow political campaigning on the base.

2. Whether the First Amendment forbids the commanding officer of the Fort Dix Military Reservation from requiring permission for the distribution of leaflets on the base, which permission would be denied only in regard to publications that clearly threaten military discipline or morale.

STATUTE AND REGULATIONS INVOLVED

18 U.S.C. 1382 provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

Department of Defense Directive 1325.6 provides:

* * * * *

III *Specific Guidelines*

The following guidelines relate to principal activities in this area which the Armed Forces have encountered:

A. *Possession and Distribution of Printed Materials*

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited.

* * * * *

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

* * * * *

Army Regulation 210–10, par. 5–5 provides in part:

* * * * *

c. Restrictions on disseminations of publications. If it appears that the dissemination of a publication presents a clear danger to the

loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

d. Reports. Concurrently with imposing a delay as authorized in *c* above, the installation commander will so inform the next major commander and Headquarters, Department of the Army (Chief of Public Information, extension 74200), and request from Headquarters, Department of the Army, approval to prohibit the distribution of that publication or the particular issue thereof. Telephonic communication will be used in each instance. If the publication in question is one which is unlikely to be available at Headquarters, Department of the Army, a copy of the publication or a transcript of the text of the portion giving rise to the dissemination restriction will be forwarded to Headquarters, Department of the Army, by the fastest available means. The delay in distribution will remain in force until the decision to approve or disapprove the request is made. These reports are exempt under provisions of paragraph 7–2*a*, AR 335–15.

e. Distribution outlets. An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless

prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported as required in *d* above.

Army Regulation 360–61 provides in pertinent part:

2–1. *General.* The policy of the Department of the Army is to support public events in the civilian domain subject to operational and training requirements, budget limitations, and guidelines enumerated in paragraph 2–3.

2–2. *Restrictions. a.* Army participation (and cooperation) is not authorized when such participation may directly or indirectly (indorse or selectively) benefit (or favor), or appear to (indorse or selectively) benefit (or favor) a private individual, group, corporation (whether for profit or nonprofit), sect, fraternal organization, quasi-religious or ideological movement, political group, or commercial venture, or be associated with solicitation of votes in a political election.

(1) For the purposes of this regulation—

(*a*) Providing use of Government facilities, such as transportation, housing, or messing, at Government expense is considered a form of Army participation.

* * * * *

Fort Dix Regulation 210–26, par. 2a provides:

> Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation.

Fort Dix Regulation 210–27 provides in part:

* * * * *

> 2. *Proper Practices:* The distribution or posting of handbills, circulars, pamphlets or other writings or publications issued by commanders and staff agencies relating to the performance of their respective missions is authorized.
>
> 3. *Prohibited Practices:*
>
> *a.* The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies other than those set forth in paragraph 2, above, and paragraph 5, below, is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters.

* * * * *

Department of Army Guidance on Dissent provides:

* * * * *

> 5. The following general guidelines are provided to cover some of the manifestations of dissent which the Army has encountered.
>
> a. *Possession and distribution of political materials.*
>
> (1) In the case of publications distributed through official outlets such as Post Exchanges

> and Post Libraries, a commander is authorized to delay distribution of a specific issue of a publication in accordance with the provisions of para. 5–5 of AR 210–10. Concurrently with the delay, a commander must submit a report to the Department of the Army * * *. A commander may delay distribution only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops.
>
> (2) In the case of distribution of publications through other than official outlets, a commander may require that prior approval be obtained for any distribution on post. Distribution without prior approval may be prohibited. A commander's denial of authority to distribute a publication on post is subject to the procedures of para. 5–5, AR 210–10, discussed above.
>
> (3) A commander may not prevent distribution of a publication simply because he does not like its contents. All denials of permission for distribution must be in accordance with the provisions of para. 5–5, AR 210–10. For example, a commander may prohibit distribution of publications which are obscene or otherwise unlawful (e.g., counselling disloyalty, mutiny, or refusal of duty). A commander may also prohibit distribution if the manner of accomplishing the distribution materially interferes with the accomplishment of a military mission (e.g., interference with training or troop formation). In any event, a commander must have cogent reasons, with supporting evidence, for any denial of distribution privi-

leges. The fact that a publication is critical—even unfairly critical—of government policies or officials is not in itself, a grounds for denial.

* * * * *

STATEMENT

1. On September 29, 1972, respondents brought this action against the Secretary of Defense and the Commander of the Fort Dix Military Reservation to enjoin the Army from enforcing its regulations governing political campaigning and the distribution of literature within Fort Dix, New Jersey, and to obtain a declaratory judgment that the regulations violated the First and Fifth Amendments (I-App. 4–10). Plaintiffs included the Socialist Workers Party and four individuals [2] who were candidates of the People's Party and the Socialist Workers Party for the offices of President and Vice President of the United States in the 1972 election (Pet. App. 10a). Of the four remaining plaintiffs, two [3] were members of the Central Committee for Conscientious Objectors [4] and the other two [5] belonged to organizations that opposed

[2] Respondents Benjamin Spock and Julius Hobson were respectively candidates of the People's Party for President and Vice President (Pet. App. 10a); plaintiffs Linda Jenness and Andrew Pulley (who were dismissed as parties, see p. 18, *infra*) were, respectively, candidates of the Socialist Workers Party for President and Vice President (*ibid.*).

[3] John Ginaven and Donald Misch (I-App. 5).

[4] In their complaint, respondents described the Committee as a non-profit organization that "publishes and distributes material on military and draft law, trains military and draft counselors, and seeks to spread knowledge of the rights of servicemen and—women" (I-App. 5).

[5] Alan Hardy and Robert Stanton (I-App. 5).

American involvement in the war in Indochina. Each of these four plaintiffs had engaged in the unauthorized distribution of literature at Fort Dix at various times in the past (dating back to 1968) and, as a result, had received letters from the Commanding Officer ejecting them from the base and barring their reentry (Pet. App. 2a–3a, 10a).

2. Fort Dix is a United States Army military reservation comprising 55 square miles in a predominantly rural area of central New Jersey, approximately 18 miles southeast of Trenton, New Jersey (Pet. App. 3a; I-App. 24). The vast majority of the geographical area of the Fort is devoted to training activities and, in order to minimize interference with the progress of training, a great deal of this area is off limits to everyone except authorized personnel (I-App. 28). The Fort headquarters, office buildings, troop billets and housing areas are located in a smaller section of the reservation, adjacent to Wrightstown, New Jersey (*id.* at 24). There are seven main entrances to Fort Dix; there are no guard houses at the entrance gates and guards are not normally posted (*ibid.*). Guards have not been utilized because of the inaccessibility of the Fort and the cost of manning the entrances to such a large military installation (Pet. App. 3a; I-App. 24). In 1972 there were some 22,000 military personnel and 6,000 dependents living on the reservation (I-App. 58). Approximately 2,600 civilians worked on the reservation; one civilian employee and his three dependents live there (*id.* at 59).

The primary military mission of Fort Dix is to train recruits in an eight and one-half week course of basic combat training. The average recruit population of the base in 1972 was 15,000. The training schedules provide for a five and one-half day training week for some battalions and a five-day week for others (*id.* at 27). During the first four weeks of training the recruits are restricted to the post (*id.* at 50).

Fort Dix also provides advanced training for several military occupations, such as that of military police officer, chaplain assistant, wheeled vehicle mechanic, wireman, and cook. Also located at Fort Dix are the Army Personnel Center, responsible for the worldwide transportation of military personnel, the Walton Army Hospital, and the Personnel Control Facility. These facilities are operated 24 hours per day, seven days a week (*id.* at 28).

The State of New Jersey retains rights of way over four county roads and the state highway that pass through Fort Dix. These roads are used primarily by military and civilian personnel working on the military installation (*id.* at 25). The sidewalks adjacent to the roads are used primarily by personnel who work at Fort Dix (*ibid.*). No sidewalks traverse the reservation and few civilians attempt to walk through the reservation along the roads (*id.* at 82–83). According to a 1970 traffic survey, approximately 66,000 civilian and military vehicles enter and exit the post each day (*id.* at 72).

Military police patrol the reservation 24 hours a day. Five to eight patrols, each comprised of two mili-

tary police officers, continuously patrol all roadways within the reservation, including those over which the state maintains rights of way (*id.* at 25, 78). Military police routinely stop persons on the reservation and ask them their reason for being on the post (*ibid.*). Military police continually check that vehicles on the post have decals indicating that the vehicle is registered on the post (*id.* at 79). From time to time, military police establish roadblocks on roads within the reservation and stop all vehicles. Such stops are intended to assure that vehicles on the post are properly registered and to keep unauthorized demonstrators off the post (*ibid.*).

The United States retains exclusive jurisdiction over Fort Dix, including the state and county roads passing through it (*id.* at 25, 79). See 52 N.J. Stat. Ann. 30–2 (1955). Traffic regulations promulgated by Fort Dix apply to the state and county roads within the reservation; traffic offenders are issued summonses to the federal magistrate (*id.* at 78–79).[6] Persons who violate Army or post regulations may be ejected from

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[6] See 27 N.J. Stat. Ann. 5A–1 (1966):

"Whenever any public road or highway is located wholly or in part within the limits of a United States military reservation, the United States military authorities shall have the power, within the limits of such reservations, to police such roads and highways, to regulate traffic thereon, and to exercise such supervisory powers over such roads and highways as they may deem necessary to protect life and property on such military reservations."

the post.[7] The United States Attorney's office is notified of any alleged violations of federal statutes (*id.* at 25).

Unfenced areas of the reservation are posted with signs reading "[N]o Trespassing, U.S. Government Property" (*id.* at 78). Signs posted on state and county roads at various entrances to the reservation warn that "[A]ll vehicles are subject to search while on the Fort Dix Military Reservation;" "[S]oliciting prohibited unless approved by the commanding general;" and "[S]treet and roads patrolled by military police" (*id.* at 197–199). Signs posted adjacent to housing areas on the reservation state that "[H]ousing areas off limits to all personnel except bonafide residents, guests and authorized vendors" (*id.* at 199).

Peddlers and solicitors must be authorized to conduct business on the reservation (*id.* at 80), and business concessions must be approved by the Fort Commander (*id.* at 61). Such concessions are primarily for the use of military personnel and their dependents; purchasers must display identification cards unless they are in uniform (*id.* at 61–62).

Civilians who are not dependents of military personnel are, however, permitted to visit nonrestricted areas of the base (*id.* at 66–67). A large sign at the

[7] Between January 1, 1971, and October 5, 1972, 155 persons were barred from reentering Fort Dix. The grounds for such actions include, *inter alia*, disorderly conduct, solicitation for prostitution, possession of narcotics, larceny, carrying a concealed weapon, traffic offenses, and distribution of unauthorized publications (I-App. 74–76).

entrance to Fort Dix on the state road that crosses the base states "Visitors Welcome" (II-App. E–4). Restricted areas, which are marked off by fences, barriers, signs, or guards (I-App. 67), include the ammunition depot, stockade, barracks, and housing areas (*id.* at 73, 199).

Performers and speakers are occasionally invited to the base to entertain or instruct military personnel (*id.* at 62). Businessmen come to speak about business management, religious talks are given at the chapel, civilians give addresses about drug abuse, and musicians occasionally give concerts (*id.* at 53–56). However, prior to the order in the instant case, no campaign speeches were permitted at Fort Dix. And prior to the appearance of Dr. Spock, no candidate for political office had ever campaigned there (*id.* at 63).

3. In September 1972, the four plaintiff candidates wrote to General David, then the Commander of Fort Dix, announcing that they intended to enter the Fort to distribute campaign literature and hold a campaign meeting with military personnel (Pet. App. 2a; I-App. 6). General David replied that the candidates would not be permitted to campaign on Fort Dix, explaining that (I-App. 14–15):

> There are several compelling reasons for this denial which I shall enumerate. First, there are lawful regulations in effect which prohibit political speeches and similar activities on all of the Fort Dix Military Reservation (Fort Dix Regulation 210–26).[8] The distribution of literature without prior approval of this head-

[8] Fort Dix Regulation 210–26 is set out at p. 6, *supra*.

quarters is also prohibited (Fort Dix Regulation 210–27).[9] Also, Department of the Army Regulations prohibit military personnel from participating in any partisan political campaign and further prohibits them from appearing at public demonstrations in uniform. The mission assigned to me as Commanding General of Fort Dix is to administer basic combat training to approximately 15,000 men at any given time. These men spend a period of eight weeks here during which they perform their training on very vigorous schedules occupying virtually all of their time. I am not in a position to dilute the quality of this training by expanding these schedules to include time to attend political campaigning and speeches. Political campaigning on Fort Dix cannot help but interfere with our training and other military missions. To decide otherwise could also give the appearance that you or your campaign is supported by me in my official capacity. I feel that I am prohibited from doing this for any candidate for public office.

Nevertheless, candidates Spock and Pulley approached the base on September 23, 1972. An officer acting on General David's behalf refused to allow the candidates to enter Fort Dix (Pet. App. 2a).

The four other plaintiffs had each been evicted from Fort Dix between 1968 and 1972 after they had been found on the base distributing pamphlets which had not been submitted for prior approval to the

[9] Fort Dix Regulation 210-27 is set out at p. 6, *supra*.

base commander, as required by Fort Dix Regulation 210–27. Plaintiff Stanton was evicted on December 5, 1968, after distributing in a barracks leaflets advertising a planned anti-war teach-in (*id.* at 9). Plaintiff Hardy was evicted on February 24, 1972, after placing on the windshields of cars parked in the lot of the base theater leaflets advertising an anti-war demonstration (*id.* at 8). Plaintiffs Ginaven and Donald Misch were evicted on August 17, 1972, after distributing on the base a booklet describing Army discharges and the rights of soldiers.[10] None of these four plaintiffs had requested permission of the Fort Dix commander prior to distributing literature on the base (*id.* at 81, 89, 91). Each of them was barred from returning to Fort Dix and advised that reentry would violate 18 U.S.C. 1382.

4. After a hearing, the district court denied plaintiffs' motion for a preliminary injunction against enforcement of the Fort Dix regulations governing political campaigning and the distribution of literature on the base (Pet. App. 8a). The court reasoned that the military had not violated plaintiffs' First Amendment rights by prohibiting them from campaigning and distributing pamphlets on public property not designated for general public use, and that

[10] Although according to the complaint (I-App. 8) and respondent Ginaven's testimony (I-App. 90), their distribution was confined to the sidewalk adjacent to the Wrightstown-Pemberton Road, the affidavit of Colonel Vincent Olsen (I-App. 25) stated that distribution took place on a parking lot adjacent to the road. The district court made no finding regarding where this distribution took place.

the military has a legitimate interest in prohibiting political activity on military bases (*id.* at 6a–7a). In the district court's view, this case differed from *Flower* v. *United States,* 407 U.S. 197, in which this Court reversed the conviction under 18 U.S.C. 1382 of an unauthorized pamphleteer on a public avenue crossing a military base over which the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets" (407 U.S. at 198), since here the military had not abandoned control over any part of Fort Dix (Pet. App. 7a).

The court of appeals reversed and directed that a preliminary injunction be entered in favor of the four plaintiff candidates, but not the four other plaintiffs who sought to distribute literature (Pet. App. 30a-31a). Relying upon *Flower, supra,* the court of appeals reasoned that "[i]f the reservation is open to all the rest of the public, there is no basis for holding that it may be closed, selectively, to political candidates or to distributors of unapproved literature" (Pet. App. 24a). This Court, dividing five-to-four, denied a stay of the court of appeals' order (409 U.S. 971; Pet. App. 33a).

The district court then entered a preliminary injunction allowing plaintiffs to campaign and to distribute campaign literature on the unrestricted areas of Fort Dix, subject only to limitations respecting time, place, and number of persons involved as "necessary to prevent interference with the military functions of the base and the flow of military and civilian traffic" (Pet. App. 34a–35a). The injunction also

barred the military from requiring prior approval of any of the candidates' communications (Pet. App. 35a). By supplementary order, the candidates or their representatives (not to exceed 25 persons at one time) were authorized to distribute campaign literature during designated times at the post exchange, family housing areas, movie theaters, and the main commissary (Pet. App. 36a–38a). In addition, the court ordered the Army to provide the candidates with a specific theater parking lot to conduct a campaign rally on the afternoon of Saturday, November 4, 1972 (Pet. App. 37a).

As these orders authorized, approximately 10,000 leaflets were distributed to military personnel at Fort Dix to announce the upcoming campaign rally (I-App. 172). Between 1:30 and 4:30 p.m. on Saturday, November 4, 1972, candidate Spock spoke to a crowd of 150 to 200 in the parking lot adjacent to a theater at Fort Dix. Approximately 60 to 75 of those attending the rally were civilians who had come to the base to hear him speak (*id.* at 172, 181). His campaign literature was also distributed there (*id.* at 172). The base authorities had assigned 60 to 65 military personnel to perform traffic control and stand-by police duty (*id.* at 181–182). Although no violent or disruptive incident occurred during the rally, 30 to 40 military personnel attended the rally in uniform and some of them held campaign placards (I-App. 174–175), in violation of AR 600–30, par. 5–29, which prohibits Army personnel from actively engaging in partisan political campaigns and permits attendance as a spec-

tator at political meetings and rallies only when the serviceman or servicewoman is not in uniform (II-App. E–63).

On June 22, 1973, the district court entered a permanent injunction in favor of candidates Spock and Hobson and the four other plaintiffs who sought to distribute literature (Pet. App. 44a–46a), all of whom are respondents here. Because plaintiff candidates Jenness and Pulley were below the constitutional age limit for the offices they had sought, however, the court dismissed the complaint in regard to them (*id.* at 40a–41a). The district court noted that the plaintiffs all desired to continue their activities at Fort Dix (*id.* at 41a). Based upon evidence of the costs of alternative methods of communicating with Fort Dix personnel (magazine and radio advertisements and direct mailing), the court found that the $10,000 jurisdictional amount requirement of 28 U.S.C. 1331(a) had been met by each plaintiff (*id.* at 41a–42a).

The district court's final order permanently enjoins the Army from interfering with political campaigning by respondents Spock, Hobson, and the Socialist Workers Party, or with the distribution of campaign literature on their behalf upon areas of Fort Dix that are open to the civilian public. The order also enjoins the Army from interfering with distribution of literature by the other respondents within the nonrestricted areas of the Fort (*id.* at 44a–45a). The order permits the Army to restrict areas of the base to military personnel, and to regulate the time, place, and number of candidates or pamphleteers "as shall be shown by defendants to be necessary to

prevent interference with the military mission of the Base and the flow of military and civilian traffic" (*id.* at 45a). The final order also enjoins the Army from enforcing its regulation barring all political speeches on base and requiring prior approval of literature distributed on the base (*ibid.*).[11]

The court of appeals affirmed the injunction (*id.* at 48a–55a).[12] The court adhered to its prior determination on the merits of the action, and sustained the district court's finding that the $10,000 jurisdictional amount requirement had been satisfied by both groups of plaintiffs (*id.* at 50a–55a).

SUMMARY OF ARGUMENT

I

Fort Dix Regulation 210–26 bars "political speeches" on the Fort Dix Military Reservation, including areas in which the public is allowed to visit. Candidates for office are therefore not permitted to engage in political campaigning on the base. This regulation does not violate the First Amendment. Candidates have no constitutional right to hold campaign rallies on a military base.

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[11] Since the final order permits any of the plaintiffs, including the Socialist Workers Party, to give a political campaign speech on the nonrestricted areas of Fort Dix, and permits anyone to distribute unauthorized literature in those areas, the case is not moot, notwithstanding that the 1972 presidential election is over.

[12] Plaintiffs Jenness and Pulley did not appeal the dismissal of the complaint as to them. Thus, that portion of the district court's order has become final.

To be sure, public roads, sidewalks, and parks "have immemorially been held in trust for use of the public and * * * have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague* v. *C.I.O.*, 307 U.S. 496, 515); and, in view of this tradition, First Amendment activities there are generally permitted. But a military base is not traditionally a "public forum." The primary purpose of military bases in general, and Fort Dix in particular, is to train military recruits, not to provide a campaign platform for candidates for elective office. The commander of a military base historically has had authority to exclude private persons from the base or admit them under such restrictions as he may prescribe to assure good order and military discipline. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893.

Contrary to the view of the court of appeals, this Court's *per curiam* opinion in *Flower* v. *United States*, 407 U.S. 197, rendered without briefing or oral argument, did not announce any broad, new constitutional principle that whenever the public is permitted to visit an area for some purposes the area becomes a "public forum" for purposes of the First Amendment. The Court in *Flower* held merely that a street passing through Fort Sam Houston in San Antonio, Texas, was in fact a "public street" that could not be distinguished from any other public highway where First Amendment activities traditionally cannot be barred.

The Court in *Flower* could not have meant that any military base visited by the public is thereby transformed into a public park where citizens are permitted to engage in a full range of First Amendment activities. That would force the military to make an all-or-nothing choice: either take the drastic step of severely restricting civilian access to Fort Dix, or treat the base as a Hyde Park. The choice is not required by the First Amendment. The Court has never held that any facility that the public is permitted to visit must function as a public forum. The Court's decisions make clear that it is the history and tradition of the place, rather than the mere fact of public access to it, that determines whether it is a "public forum" under the First Amendment.

The Fort Dix commanding officer had more than ample reasons for prohibiting all political campaign speeches on the base. The regulation reinforces a long line of statutes designed to guard against military involvement in the nation's political processes. If candidates were entitled to hold campaign rallies on the base, Army personnel stationed there might feel constrained to attend the speeches of those candidates perceived to be in favor of the Army and refrain from attending the speeches of those who might speak out against the Army's practices—a possibility made all the more likely on a base like Fort Dix, which is primarily concerned with the basic training of recruits. Furthermore, if political campaign speeches were permitted on base, sharp variations in attendance by military personnel might create the public impression that members of the Armed Forces were expressing their support or lack of support of particular candi-

dates—an impression that could unduly influence civilian voters. And the advent of campaign rallies on base would require that the military make delicate administrative decisions about where and when the rally is to be held and the extent to which support services should be provided—decisions likely to create lurking doubts about political favoritism, and to result in the withdrawal of facilities and personnel from military functions they otherwise would perform.

Beyond this, certain candidates might express views that could undermine morale, obedience and discipline of members of the military on the base, where it is necessary that the "law is that of obedience." *In re Grimley,* 137 U.S. 147, 153; *Parker* v. *Levy,* 417 U.S. 733, 758. Rather than discriminate among candidates on the basis of what they could be expected to say, the Fort Dix commander has wisely chosen to establish a flat ban on all campaigning on base.

What petitioners seek is not insulation of members of the armed forces from political ideas and preferences. We assert nothing more than that the role of soldier and political partisan should not be permitted to merge, that the political process should not be tainted by the introduction of a distinctively military position, and that the cohesiveness of the military should not be jeopardized by the introduction of partisan political activities. The danger of politicization of the military is minimized by regulations that draw a sharp line between politics and the armed forces and between military personnel functioning as citizens and as integral parts of the military community.

II

The final order of the district court also enjoined petitioners from enforcing Fort Dix Regulation 210–27 insofar as it requires prior submission of materials to be distributed on the base and from otherwise interfering with distribution of literature within any of the unrestricted areas of the base. Under the regulation the only publications that could not be handed out on the base would be those that posed a clear danger to the loyalty, morale or discipline of the troops.

The regulation is not a prior restraint on free speech in violation of the First Amendment. Official actions identified as unlawful prior restraints have occurred only "where public officials had forbidden the plaintiffs the use of *public places* to say what they wanted to say." *Southeastern Promotions, Ltd.* v. *Conrad,* No. 73–1004, decided March 18, 1975, slip op. 6 (emphasis supplied). But the nonrestricted areas of Fort Dix are not, as in *Southeastern Promotions,* "public forums designed for and dedicated to expressive activities" (*id.* at 9). Fort Dix is designed for and dedicated to the training of military recruits and it is therefore "a facility primarily serving a competing use" (*ibid.*).

Moreover, the regulation is reasonably calculated to provide a fair and efficient means of screening out literature that poses a "clear danger" to military loyalty, discipline, or morale. See *Procunier* v. *Martinez,* 416 U.S. 396, 413. Any disapproval of a request to distribute literature must be supported by specific

findings and is subject to prompt administrative review.

In addition, this Fort Dix regulation is not "based on content alone" and is not "justified by reference to content alone." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 96. Rather, it is aimed at the effect of the publication on the discipline and morale of the troops on the base. If a municipal ordinance, regulating "disruptive" speech activities on a *public sidewalk,* does not violate the First Amendment because of the state's interest in the functioning of its schools, see *Grayned* v. *City of Rockford,* 408 U.S. 104, 118–119, still less is the First Amendment violated by a regulation, applicable to areas within a military base, that seeks to preserve the discipline and morale of the troops on the base.

There is no contention here that the Fort Dix commander acted arbitrarily or capriciously in denying permission to distribute certain literature. In fact, respondents never submitted material for review. Moreover, they were not precluded from using other means of communicating with military personnel, such as employing the printed or broadcast media or distributing literature to military personnel outside the Fort.

ARGUMENT

I

THE FIRST AMENDMENT DOES NOT REQUIRE THE COMMANDING OFFICER OF THE FORT DIX MILITARY RESERVATION TO PERMIT POLITICAL CAMPAIGNING ON THE BASE

The First Amendment to the Constitution provides that "the freedom of speech" shall not be abridged but as Mr. Justice Black stated for the Court, this has never meant "that people who want to propagandize protests or views have a constitutional right to do so * * * wherever they please." *Adderley* v. *Florida,* 385 U.S. 39, 48. The protections of the First Amendment, which prevent the government from restricting freedom of speech and assembly, apply only if the people have a right to be in a particular place for such purposes. Unlike public roads, sidewalks and parks, a military base is not required or intended to serve as a forum for free speech activities and certainly not for political campaigning, which is the activity involved in this aspect of the case.[13] For the

[13] Althought the regulation at issue here (n. 14, *infra*) is not limited to the giving of campaign speeches by or on behalf of candidates for office, that is the only activity involved in this case. Only those respondents who were candidates sought permission to give speeches at the base, and their complaint was based on an alleged deprivation of their First Amendment rights "to carry their ideas and election campaigns" to Fort Dix; they also emphasized their status as minor party candi-

reasons discussed below, we therefore submit that the Fort Dix regulation[14] that prohibits all campaign

dates for office (I-App. 8). The court of appeals, in deciding this issue on respondents' appeal from a denial of a preliminary injunction, stressed that these respondents were candidates for office and rested its First Amendment analysis to a great extent upon their status and their purported need to hold a campaign rally on the base (Pet. App. 28a–29a). But see n. 39, *infra*. The memorandum of the district court on respondents' motion for a permanent injunction noted that respondents Spock and Hobson "desire to continue political activity on the military reservation" (Pet. App. 41a). The final order of the district court enjoined petitioners from "interfering with political campaigning" by respondents (Pet. App. 44a), and the final opinion of the court of appeals, after the 1972 election had been held, considered the question of jurisdictional amount in terms of "the value of the right to campaign for the offices of President and Vice President" (*id.* at 51a). (Prior to the 1972 election, one of the non-candidate respondents testified that if he were allowed on the base he would hand out leaflets "and also to talk to GI's about GI rights" (I-App. 90), but he did not indicate that he desired to give political speeches and there is no indication that he did so on the base after the entry of the preliminary injunction.)

[14] Fort Dix Regulation 210–26 bars "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" on the Fort Dix Military Reservation (II-App. E–76).

In regard to "demonstrations," which are not involved in this case (see n. 13, *supra*), the Fort Dix regulation is more stringent than the Army guidelines, which suggest that permits "to conduct an on-post demonstration in an area to which the public has generally been granted access should not be denied on an arbitrary basis. Such a permit may be denied on a reasonable basis, such as a showing that the demonstration may result in a clear interference with or prevention of orderly accomplishment of the mission of the post, or present a clear danger to loyalty, discipline, and morale of the troops" (II-App. E–53).

speeches on the base, like the statute forbidding pickets or parades "in or near" courthouses upheld in *Cox* v. *Louisiana*, 379 U.S. 559, is constitutional and that the court of appeals erred in holding otherwise.

The line of decisions by this Court concerning the right of free speech in "public places" begins with *Davis* v. *Massachusetts*, 167 U.S. 43, which sustained an ordinance requiring a permit from the mayor of Boston before any person could make a public address on public grounds because, in the Court's view, the legislature could forbid speeches there altogether.[15] In *Hague* v. *C.I.O.*, 307 U.S. 496, however, the Court appeared to depart from this approach and, in his opinion (*id.* at 515–516), Mr. Justice Roberts stated in dictum a view that the Court has cited and relied upon in subsequent cases:[16]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust

[15] The Court adopted the reasoning in the opinion by Mr. Justice Holmes, sitting on the Massachusetts Supreme Judicial Court, that "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in his house." *Commonwealth* v. *Davis*, 162 Mass. 510, 511. See generally Mr. Justice Frankfurter, concurring in *Niemotko* v. *Maryland*, 340 U.S. 268, 276–283; Kalven, *The Concept of Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 12–15.

[16] *Jamison* v. *Texas*, 318 U.S. 413, 416; *Saia* v. *New York*, 334 U.S. 558, 561, n. 2; but see *id.* at 568, n. 1 (Mr. Justice Jackson dissenting); *Kunz* v. *New York*, 340 U.S. 290, 293; *Grayned* v. *City of Rockford*, 408 U.S. 104, 115; see also *Schneider* v. *State*, 308 U.S. 147, 162; *Flower* v. *United States*, 407 U.S. 197; *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 559.

> for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Public streets, sidewalks and parks are thus recognized by the Court as areas where the public has a right to engage in free speech.[17] Historically, these are the traditional places for such activity and, although the state may impose reasonable regulations regarding time, place and manner[18] in order to preserve the primary purposes of the areas, it cannot absolutely bar the public from using such places as public forums.[19]

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[17] *Lloyd Corp.* v. *Tanner*, *supra*, 407 U.S. at 559: "it has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely."

[18] See, *e.g.*, *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98.

[19] The Court has extended the public forum concept to include state capitol grounds, *Edwards* v. *South Carolina*, 372 U.S. 229, and, for some purposes, private shopping centers, compare *Lloyd Corp.* v. *Tanner*, *supra*, with *Amalgamated*

There are other publicly owned areas, however, that have not traditionally been used for the exercise of First Amendment rights and where the public has no right of access for such purposes.[20] Military bases in general, and Fort Dix in particular, are such places.

Until the preliminary injunction was issued in this case, no one had ever given or been permitted to give a political campaign speech on the Fort Dix Military Reservation (I–App. 63). It is the "primary business of armies and navies to fight or to be ready to fight wars should the occasion arise," *Toth* v. *Quarles*, 350 U.S. 11, 17, and the purpose of the base is to train

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Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, and municipal theatres, *Southeastern Promotions, Ltd.* v. *Conrad*, No. 73–1004, decided March 18, 1975, slip op. at 9–10, *id.* at 1 (Mr. Justice Douglas, dissenting).

[20] See *Adderley* v. *Florida*, *supra* (demonstration on the grounds of a jail); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (advertising space on vehicles of a city transit system). See also Mr. Justice Brennan, dissenting in *Lehman*, *supra*, 418 U.S. at 312 ("To be sure, there are some public places which are so clearly committed to other purposes that their use as public forums for communication is anomalous."); and Mr. Justice Douglas, dissenting in *Adderley*, *supra*, 385 U.S. at 54:

"There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put."

military recruits, not to provide a public forum for candidates for office. As far as tradition is concerned, the commander of a military base historically has had authority " 'in his discretion, [to] exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline (1918 Dig. Op. J.A.G. 267 and cases cited).' JAGA 1925/680.44, 6 October 1925." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 893. Indeed, as this Court has recognized, management of "the internal operation of an important federal military establishment" is something over which "the Federal Government * * * has traditionally exercised unfettered control" (*id.* at 896).[21]

Thus, in Mr. Justice Roberts' words, the Fort Dix Military Reservation is not "held in trust for the use of the public" and political campaigning on this base has not "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague* v. *C.I.O., supra,* 307 U.S. at 515.

However, the court of appeals, relying on *Flower* v. *United States,* 407 U.S. 197, apparently decided that since there are areas of Fort Dix open to the public, these areas must be considered "public forums" under the First Amendment; therefore, the court concluded, the Fort Dix regulation barring all political campaign

[21] See also *Holdridge* v. *United States*, 282 F.2d 302 (C.A. 8); *Weissman* v. *United States*, 387 F.2d 271 (C.A. 10); *United States* v. *Jelinski*, 411 F.2d 476 (C.A. 5), certiorari denied, 396 U.S. 943; *Bridges* v. *Davis*, 443 F.2d 970 (C.A. 9), certiorari denied, 405 U.S. 919; 3 Op. Atty. Gen. 268 (1837); 26 Op. Atty. Gen. 91 (1906).

speeches on the base was unconstitutional because it denied access to places where candidates had a right to be for such purposes (Pet. App. 21a–24a, 26a–29a).

The holding of the court of appeals in this regard is, we submit, erroneous. That the public may visit publicly owned property does not mean that the property is therefore a "public forum," [22] and this Court

[22] Mr. Justice Blackmun's opinion in *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 302 (joined by three other Members of the Court) and Mr. Justice Frankfurter's concurring opinion in *Niemotko* v. *Maryland*, *supra*, 340 U.S. at 283, n. 1, quoted from Lord Dunedin's remarks in *M'Ara* v. *Edinburgh Magistrates and Others*, 50 Sc. L. Rep. 829, 837, which are pertinent here:

"Now the right of free speech undoubtedly exists, and the right of free speech is to promulgate your opinions by speech so long as you do not utter what is treasonable or libellous, or make yourself obnoxious to the statutes that deal with blasphemy and obscenity. But the right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised. You may say what you like provided it is not obnoxious in the ways I have indicated, but that does not mean that you may say it anywhere.

"I am not going to deal with what may be the case in open spaces or public places. It seems to me that no general pronouncement upon that subject could be made, because although for convenience sake one often speaks of open spaces or of public places, the truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place. For example, there may be certain places which are dedicated to certain uses, * * * and things that otherwise were lawful might be restrained if they interfered with the purposes of that dedication. Each of those cases must be dealt with when it arises. Here we are dealing with a street proper, because this place at the Mound is just one of the streets of the city. It is a thoroughfare, although probably not a very much used thoroughfare at that particular corner. In such a place there

has never held otherwise. First Amendment activities cannot be absolutely barred from public streets, sidewalks and parks but this is because these are the traditional places for such activities;[23] obviously that tradition could not have arisen and become part of "the freedom of speech" if the public had always been barred from such places; but it is the history and tradition of the place, not the fact of public access to it, that determines whether it is a "public forum" for First Amendment purposes.[24]

No one, for example, would suppose that political candidates have a constitutional right to give campaign speeches on the grounds of or inside the areas of the Supreme Court building generally open to the public; and under 40 U.S.C. 13k, it is "unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any *party*, organization, or movement" (emphasis added). Indeed, although the public had free access to the area "near" the courthouse in *Cox* v. *Louisiana, supra,* 379

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is not the slightest right in anyone to hold a meeting as such."

[23] See pp. 27–28, *supra.*

[24] See, *e.g., Lloyd Corp.* v. *Tanner, supra; Lehman* v. *City of Shaker Heights, supra,* 418 U.S. at 303 (opinion of Mr. Justice Blackmun); *id.* at 306 (Mr. Justice Douglas, concurring: "But a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not without more make it a forum.")

U.S. at 562, the Court nevertheless held that no one had a First Amendment right to picket there.[25]

Thus, *Flower* v. *United States, supra,* cannot be read as establishing any new First Amendment principles: it does not mean, as the court below thought it did, that if a publicly owned area is open to the public for any purpose, the area becomes a public forum for purposes of the First Amendment.[26] In a *per curiam* opinion not preceded by briefing or oral argument, the Court in *Flower* held merely that a street passing through Fort Sam Houston in San Antonio, Texas, was in fact a "public street" that could not be distinguished from any other public highway; therefore, the military authorities could not prevent a civilian from handing out leaflets along the street to the many civilians and military personnel that passed by each day. 407 U.S. at 198. In short, the street in *Flower* was a public street, and the decisions of this Court regarding streets, sidewalks and parks applied.[27]

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[25] See also Kalven, note 15 *supra,* at 30.

[26] Other courts have similarly read *Flower* to establish the proposition that an area open to the public thereby becomes a public forum for First Amendment activities. See *United States* v. *Gourley,* 502 F.2d 785, 787–788 (C.A. 10) (pamphleteering and demonstrating); *Burnett* v. *Tolson,* 474 F.2d 877, 880–881 (C.A. 4) (leafletting); *CCCO-Western Region* v. *Fellows,* 359 F. Supp. 644, 649–650 (N.D. Cal.) (leafletting); *Jenness* v. *Forbes,* 351 F. Supp. 88, 94–95 (D. R.I.)

[27] In *Flower* the Court accordingly quoted *Jamison* v. *Texas, supra,* 318 U.S. at 416 ("one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion"). 407 U.S. at 198–199.

In order to apply *Flower* to this case, the Court would have to find that Fort Dix is, in effect, a public park where the only restrictions on freedom of expression can be regulations governing time, place and manner. Such a finding would not only be contrary to the record,[28] but also would require the military to make an all-or-nothing choice: either take the drastic step of severely restricting civilian access to Fort Dix, placing numerous guards and strict warnings throughout the area, or transform the base into a Hyde

[28] Unlike New Braunfels Avenue within Fort Sam Houston where the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets * * *," *Flower* v. *United States*, *supra*, 407 U.S. at 198, the areas of Fort Dix open to the public nevertheless are dedicated primarily to military purposes. The provost marshal of the base patrols all roads on a 24-hour basis, signs are conspicuously posted warning that civilian vehicles are subject to search, the military police occasionally impose roadblocks to check all vehicles, "No Trespassing" signs are conspicuously posted over part of the area, and the military authorities actively enforce regulations providing for eviction of civilians engaged in unlawful activities (I–App. 25, 78, 79). Peddlers, solicitors, and concessionaries must be authorized by the Fort Commander to conduct business on the base, and customers must display identification cards (*id.* at 61–62, 80). The Army has not, therefore, "abandoned any claim" that it has a special interest in what occurs on nonrestricted areas of the base. Moreover, while in *Flower* the distribution of leaflets may have been directed primarily at civilians passing on the public sidewalk, respondent candidates in the instant case avowedly sought to "visit Fort Dix to campaign among the servicemen and servicewomen there" (*id.* at 12). Their activities were not confined to an avenue or sidewalk. Candidate Spock spoke to a crowd of 150 to 200 persons on a parking lot adjacent to a theater within the military compound (*id.* at 172, 181).

Park.[29] The First Amendment does not demand that such a choice be made. The Fort Dix commanding officer had more than an adequate basis for deciding to prohibit all political campaign speeches on the base [30] and this was a decision he had authority to make.[31]

Traditionally, the military has attempted to remain politically neutral, particularly with respect to candidates for elective office. Nearly a century ago, General William T. Sherman, Commanding General of the Army from 1869 to 1883, stated that it was vitally important to "keep the Army and Navy as free from politics as possible, for emergencies that may arise at

[29] See *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 304 (opinion of Blackmun, J.), refusing to transform public transit cars into First Amendment forums because if the Court held otherwise "display cases in * * * military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician."

[30] In assessing the validity of restrictions on "free speech" activities in regard to areas other than traditional public forums, the Court has examined the reasons for the regulations in light of the purposes served by the public facility or area. See *Pell* v. *Procunier*, 417 U.S. 817, 823–828; *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 302–303 (opinion of Blackmun, J.); *Adderley* v. *Florida*, *supra*, 385 U.S. at 47–48 ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."); *Cox* v. *Louisiana*, *supra*, 379 U.S. at 562 ("There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create."); *id.* at 583 (Mr. Justice Black, concurring in this portion of the Court's opinion). See also *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 119.

[31] See *Cafeteria Workers* v. *McElroy*, *supra*, 367 U.S. at 893, 896. See p. 30, *infra*.

any time" (Thorndike, *The Sherman Letters* 342 (1894)).[32]

Recognizing that military influence in elections and military support of candidates for office could threaten democratic processes, Congress has enacted a long line of statutes designed to guard against military involvement in the nation's political processes. Members of the armed forces may not be polled by any person or political party to determine their choice among candidates for elective office. 18 U.S.C. 596. It is unlawful to solicit political contributions in any fort or arsenal, 18 U.S.C. 603; candidates for federal office are prohibited from soliciting contributions from military personnel, 18 U.S.C. 602.[33] And no commissioned or noncommissioned officer in the Armed Forces may attempt to influence any member of the Armed Forces to vote for any particular candidate. 50 U.S.C. 1475.[34]

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[32] See also Carter, *The Evolution of Army Reforms*, 3 United Service 1190 (May, 1903); Hayes, *The Writings of Stephen B. Luce*, 29 Military Affairs 78 (Winter, 1955).

[33] 18 U.S.C. 602 applies to any officer or employee of the United States or any department or agency thereof. See also 18 U.S.C. 607.

[34] Moreover, no officer of the Armed Forces may "in any manner interfere with the freedom of any election in any State." 42 U.S.C. 1972. See also 18 U.S.C. 593. It is unlawful for a military officer to have troops under his control at any place where a general election is held. 18 U.S.C. 592.

AR 600–20, par. 5–29 prohibits any member of the Army from becoming a candidate for or holding civil office (pars. 5–30 and 5–31). Servicemen are prohibited from actively participating in partisan political campaigns on or off base, such as making partisan public speeches in the course of a campaign (AR 600–20, Appendix A, par. A–2, II–App. E–63 to E–64, E–65). AR 670–5, par. 1–2(*f*)(5) prohibits servicemen from wearing their uniforms when participating in activities, "such as public speeches, interviews, picket lines, marches, rallies, or any public demonstration (including those pertaining to civil rights), which may imply service sanction of the cause for which the demonstration or activity is being conducted" (II–App. E–73 to E–74).

The regulation prohibiting political campaign speeches on Fort Dix reinforces this legislation and the tradition of political neutrality of the military reflected in it. If candidates were permitted to hold campaign rallies on the base, as respondents did, there would be a real danger that units of the nation's armed forces would become politicized. Members of the Army stationed there might feel constrained to attend the speeches of those candidates perceived to be in favor of the Army and refrain from attending the speeches of those who might speak out against the Army's practices. There is no way to avoid the possibility of apprehension in the minds of servicemen and servicewomen that their attendance or failure to attend a particular campaign rally on the base might be viewed with disfavor by their superiors; and the possibility of such apprehension is all the more likely on a base like Fort Dix, which is primarily concerned with the basic training of recruits. Yet as the statutes set forth above indicate, Congress has legislated to prevent military officers from influencing the votes of those in their command. The First Amendment, we submit, did not forbid the commanding officer of

Fort Dix from guarding against the same evil by forbidding campaign speeches on the base altogether.[35]

Moreover, if political speeches were allowed on the base, the rallies of some candidates might be poorly attended while other candidates might draw large audiences. This could create the public impression that members of the Armed Forces were expressing their support or lack of support of particular political candidates and parties, an impression that could unduly influence civilian voters in their choice.[36] In view of this danger, it is hardly surprising that Congress has made it a criminal offense to poll servicemen about their preferences in an election. 18 U.S.C. 596.

Beyond this, it is important to remember that we are concerned here with a military facility devoted to a particular military mission. The advent of campaign rallies on military bases not only will require that the military make delicate administrative decisions about where and when the rally is to be held and the extent to which support services should be provided—decisions which may create lurking doubts about political favoritism, cf. *Lehman* v. *City of Shaker Heights, supra,* 418 U.S. at 304—but also may result in military facilities and support personnel used in the rally being withdrawn from military

[35] In this regard, see the Court's recent decision in *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, upholding the constitutionality of Section 9(a) of the Hatch Act, 5 U.S.C. 7324(a)(2).

[36] The holding of a political campaign rally on a military base may also create the impression that the military authorities there favor the candidate if no or only a few other candidates choose to appear at the base.

functions they otherwise would perform. Accommodation of a number of such campaign rallies could therefore hamper the efficiency of military training.

It is similarly important to recognize that unlike the situation in the civilian community, the commanding officer of a military base has a direct and legitimate interest in preserving the discipline and morale of his troops. See *Parker* v. *Levy,* 417 U.S. 733, 759. We do not in any way deprecate the value of freedom of speech by observing that certain candidates might express views that could undermine the morale, obedience and discipline of members of the military at the base.[37] In a civilian context, speech could not and should not be regulated for such a reason, but First Amendment principles cannot be so readily transferred to a military setting where the "law is that of obedience." *In re Grimley,* 137 U.S. 147, 153; see *Parker* v. *Levy, supra,* 417 U.S. at 758. Of course, one way of preventing any impairment of morale and discipline would be to discriminate among candidates on the basis of what they could be expected to say. The Fort Dix authorities have wisely chosen not to do so[38] and have instead attempted to keep the

[37] 18 U.S.C. 2387 makes it a criminal offense to urge or counsel insubordination or refusal of duty by any member of the military, with intent to impair the "loyalty, morale, or discipline of the military or naval forces of the United States."

[38] There is no suggestion that Fort Dix Regulation 210-26 has ever been administered in a discriminatory manner. Prior to Dr. Spock's appearance at Fort Dix, no political candidate had ever appeared there. Compare *Jenness* v. *Forbes,* 351 F. Supp. 88 (D. R.I.); *Butler* v. *United States,* 365 F. Supp. 1035 (D. Haw.).

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base free from political entanglement by refusing to allow it to be used as a campaign platform."[39]

Members of the military are, of course, continually exposed to the clash of political ideas. Advocacy and debate reach them on military bases through television, radio, magazines, newspapers, and discussions with other military persons. While off-base, members of the armed forces, if out of uniform, may freely attend political rallies. Thus, what petitioners seek here is not insulation of members of the armed forces from political ideas and preferences. It is vital that mem-

[39] The court of appeals stated that in regard to Fort Dix there was a "feigned neutrality" that "serves no discernible military purpose" (Pet. App. 29a). The court did not suggest that the Fort Dix military authorities had been supporting certain candidates. Rather, the court's statement was directed to the fact that servicemen on the base had numerous means, such as radio, television and the press, for receiving information about candidates; in view of this, the court apparently believed that "minor candidates" who did not attract media coverage were disadvantaged in reaching military personnel on the base (*ibid.*). There are a number of answers to this line of reasoning.

First, as discussed above, the military's neutrality does serve a purpose and an important one. Second "minor" candidates are usually financially disadvantaged, but the First Amendment does not give them any greater rights than more prominent candidates. Third, the fact that some candidates cannot afford television advertisements or newspaper announcements does not confer upon them a right to campaign wherever they please: there is no reason why, if they desire to conduct a face-to-face campaign, they cannot hold campaign rallies outside the base for servicemen who can attend on their free time so long as they are not in uniform. Fourth, the availability of this alternative means of communication, as well as the others mentioned above, militates strongly in favor of the validity of the on-base campaigning bar, as the Court held in an analogous situation in *Pell* v. *Procunier*, *supra*, 417 U.S. at 823–828.

bers of the armed forces of a democracy also play the roles of citizens of the wider political community. All that petitioners seek is that the role of soldier and that of political partisan never be permitted to merge, that the armed forces be protected from politicization in the interests both of our political process and of the effectiveness of our military forces.

Politicization of the military could take either of two forms, each highly undesirable. Unrestricted campaigning upon military bases could, in some atmospheres, produce a distinctively military position in civilian politics, a result that should be viewed as little short of catastrophic, a result that would be a breach of the philosophy underlying the American idea of a politically neutral military establishment under civilian control. In other circumstances, in times of bitterly divisive national politics, politicization of the military could result in sharp political divisions within the armed forces, a condition that might prove disastrous to the cohesiveness of military units and their ability to carry out their assigned missions.

The dangers of politicization are minimized by regulations that make military bases enclaves in which explicitly partisan political rallies may not be held. This regulation tells the public as well as the armed forces that there is a distinct line between American politics and American armed forces, that when members of the armed forces engage in political campaigns they do so as individuals, out of uniform and off base, not on base as integral parts of a military community.

In view of the foregoing, the Fort Dix regulation is, we submit, valid under the First Amendment. The authority of a commanding officer over his post is necessarily broad [40] and his judgment on matters such as those at issue here, which involve the functioning of the base and the troops under his command, are entitled to much weight. See *Cafeteria Workers* v. *McElroy, supra,* 367 U.S. at 890–893. As this Court stated in *Orloff* v. *Willoughby,* 345 U.S. 83, 94, the "military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." See *Schlesinger* v. *Ballard,* 419 U.S. 498, 510.

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[40] See *Committee to Free the Fort Dix 38* v. *Collins,* 429 F. 2d 807, 809 (C.A. 3) (civilians were refused permission to demonstrate on the base against Fort Dix stockade conditions; the court held that the case was moot). As the court of appeals there pointed out, Article I, Sec. 8, of the Constitution gives Congress power to raise armies, to make rules to govern the land and naval forces, and to exercise exclusive legislation over forts. Article II, Sec. 2, provides that the President shall be the Commander in Chief of the Army and Navy. See *Schlesinger* v. *Ballard,* 419 U.S. 498, 510. Under 10 U.S.C. 3061, the President "may prescribe regulations for the government of the Army"; and 32 C.F.R. 552.18(d) provides:

"The installation commander will establish appropriate rules governing the entry of persons upon and exit from, the installation * * *."

II

THE FIRST AMENDMENT DID NOT FORBID THE COMMANDING OFFICER OF THE FORT DIX MILITARY RESERVATION FROM REQUIRING PERMISSION FOR THE DISTRIBUTION OF LEAFLETS ON THE BASE, WHICH PERMISSION WOULD BE DENIED ONLY IN REGARD TO PUBLICATIONS THAT CLEARLY THREATEN MILITARY DISCIPLINE OR MORALE

Fort Dix Regulation 210–27 prohibits the "distribution or posting of any publication * * * [on base] without prior written approval of the Adjutant General * * *" (II-App E–78).[41] Exceptions are made only for official military publications. Distributions through official outlets, such as post-exchange newsstands, are governed by separate regulations.[42] A commander must

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[41] Military regulations requiring prior approval for on-base distributions of literature by *servicemen* have been uniformly sustained. See, *e.g., Dash* v. *Commanding General,* 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981; *Yahr* v. *Resor,* 431 F. 2d 690 (C.A. 4), certiorari denied, 401 U.S. 982; *Noland* v. *Irby,* 341 F. Supp. 818 (W.D. Ky), affirmed *sub nom. Noland* v. *Desobry,* C.A. 6, No. 71–1661 April 24, 1972, certiorari denied, 409 U.S. 934; *Schneider* v. *Laird,* 453 F. 2d 345 (C.A. 10), certiorari denied, 407 U.S. 914; *Carlson* v. *Schlesinger,* 511 F. 2d 1327 (C.A.D.C.).

[42] While no prior approval is required for the distribution [redacted] of materials through official outlets, such as the post exchange, a post commander may delay distribution of a specific periodical only if he finds that it constitutes a clear danger to military loyalty, discipline, or morale. If the Department of the Army agrees, distribution can be prohibited (see AR 210–10, II-App. E–58). Of course, established publications—unlike most pamphlets distributed by civilians— have past issues which normally provide a clear indication whether their next issue is likely to present a "clear danger" to the military.

approve distribution unless he finds that the "publication constitutes a clear danger to military loyalty, discipline, or morale" (AR 210–10, par. 5–5*b*, II-App. E–58). The Army Directive on Guidance on Dissent states that a "commander may not prevent distribution of a publication simply because he does not like its contents" or because it "is critical—even unfairly critical—of government policies or officials * * *" (II-App. E–51). As examples of publications that can be barred, the Directive lists publications which are obscene or that counsel disloyalty, mutiny, or refusal of duty (*ibid.*). AR 210–10 provides for prompt review by the Department of the Army of any decision denying approval (*id.* at E–58).

The final order of the district court, enjoining petitioners from enforcing Fort Dix Regulation 210–27 insofar as it requires prior submission and approval of materials to be distributed on the base and from otherwise interfering with distribution of literature within any of the unrestricted areas of Fort Dix (Pet. App. 44a–45a), vitiates the base commander's authority to prevent clearly dangerous publications from being distributed to military personnel under his command,[43] unless he were to take the drastic step of

[43] The new regulation governing the distribution of literature at Fort Dix, promulgated in light of the final order of the district court, does not require that the literature sought to be distributed be submitted for approval prior to distribution. Permission will ordinarily be granted to distribute in nonrestricted areas normally accessible to the public "provided that the manner of distribution does not interfere with normal traffic flow and is conducted at such times and places as will not hinder the accomplishment of any military mission." Fort Dix Regulation 210–27 (December 16, 1974).

closing the entire base to civilians. But "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline" in the military, *Parker* v. *Levy, supra,* 417 U.S. at 758, is crucial to the military mission and "the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman,* No. 73–662, decided March 25, 1975, slip op.

As the Court of Military Appeals has explained (*United States* v. *Priest,* 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338):

> Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. *Brandenburg* v. *Ohio, supra* [395 U.S. 444]. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected. *United States* v. *Gray, supra* [20 U.S.C.M.A. 63].

See also *Dash* v. *Commanding General,* 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981; *Schneider* v. *Laird,* 453 F. 2d 345 (C.A. 10), certiorari denied, 407 U.S. 914.

Fort Dix Regulation 210–27 is not an unconstitutional prior restraint upon free speech. The government function at stake is not the police power to control civilian activities on public streets, parks, and walkways, where prior restraints on First Amendment rights must bear a heavy presumption against their constitutional validity. See, *e.g., Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419. As we indicated in part I, *supra,* Fort Dix is not a "public forum" and the nonrestricted areas of the base are not like public parks or public streets where the First Amendment traditionally protects communicative activities. Notwithstanding that civilians may visit there, the property is dedicated primarily to military purposes See pp. 29–35, *supra.*

Official actions identified as unconstitutional prior restraints have occurred "where public officials had forbidden the plaintiffs the use of *public places* to say what they wanted to say." *Southeastern Promotions, Ltd.* v. *Conrad,* No. 73–1004, decided March 18, 1975, slip op. at 6 (emphasis supplied). But when, as here, the place is not a public forum to begin with, the power to deny its use in advance of actual expression is not constitutionally suspect. As the Court stressed in *Southeastern Promotions,* the prior restraints there related to "public forums designed for and dedicated to expressive activities," (*id.* at 9), and the "[p]etitioner was not seeking to use a facility primarily serving a competing use," (*ibid.*). Fort Dix, in contrast, is not now, and has never been, a traditional public forum, and it primarily serves a competing use—the training of military recruits.

Moreover, in *Procunier* v. *Martinez,* 416 U.S. 396, which involved the constitutionality of prison regulations authorizing censorship of inmate correspondence, the Court enumerated the following standard for determining the constitutionality of such regulations (416 U.S. at 413):

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. * * * Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

These criteria are satisfied by Fort Dix Regulation 210–27, which furthers the substantial governmental interest of assuring that civilians who enter the military facility intending to distribute literature will not jeopardize military loyalty, discipline, or morale. Moreover, the regulation is reasonably calculated to provide a fair and efficient means of screening out such publications. The discretion of the base commander is confined within reasonably precise standards. *Parker* v. *Levy, supra,* 417 U.S. at 752–757. The base commander may deny permission only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops. He is required to make specific findings in support of any restriction imposed by him under the regulation. He may not prevent distribution of a publication simply because he does not like its contents or because the publication is critical—even unfairly criti-

cal—of government policies or officials. And any decision to deny permission is subject to prompt administrative review (II–App. E–58).

This regulation is not "based on content alone" and is not "justified by reference to content alone." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 96. Rather, it is aimed at the effect of the publication on the discipline and morale of the troops on the base. In *Grayned* v. *City of Rockford, supra,* 408 U.S. at 118–119, the Court sustained an ordinance prohibiting picketing on a *public sidewalk* outside a school building because the regulation punished only "expressive activity" that "disrupts or is about to disrupt normal school activities."[44] If such a municipal ordinance, regulating speech on a *public sidewalk,*[45] does not violate the freedom of speech because of the state's interest in the functioning of its schools, still less is the First Amendment violated by a regulation, applicable to areas within a military base, that seeks to preserve the discipline and morale of the troops on the base.

As we emphasized in part I, supra, pp. 35–42, the military is a specialized community, the relationship of a commander to his troops has no counterpart in the civilian community, and the commander has the authority, indeed the duty, to ensure the discipline and morale of the servicemen under his command. The

[44] The Court recognized that the ordinance prohibited "some picketing that is neither violent nor physically obstructive." 408 U.S. at 120.

[45] Cf. *Flower* v. *United States, supra.*

Founders knew this full well and could hardly have intended the First Amendment to abrogate this long-standing practice and tradition. The interest of a municipality in the orderly functioning of its schools is important, to be sure; but in light of the unique relationship of a base commander to his troops and the fact that the regulation at issue here deals solely with activities inside a military base, it is plainer still that "[s]uch a reasonable regulation is not inconsistent with the First" Amendment. *Grayned* v. *City of Rockford, supra,* 408 U.S. at 121.[46]

"It is possible, of course, that there will be unconstitutional applications; but that is not a matter which presently concerns us." *Grayned* v. *City of Rockford, supra,* 408 U.S. at 121 n. 50, citing *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 91. There is not, and cannot be, a contention here that the commander of Fort Dix acted arbitrarily or capriciously in denying permission to distribute certain literature.[47] In fact, respondents never submitted any material for

[46] As in *Grayned*, the regulation here is not an "impermissibly broad prophylactic ordinance" since it would prohibit only the distribution of leaflets that present a clear danger to loyalty, discipline or morale. 408 U.S. at 119.

[47] During the hearing on the preliminary injunction, Colonel Vincent Olsen, provost marshal at Fort Dix, was asked to explain the procedure for distributing literature through the post exchange. He testified, incorrectly, that literature would not be allowed to be distributed "if it's wrong" (I–App. 77). As Colonel Olsen stated and the court noted, it was not Colonel Olsen's job to review literature for distribution (*id.* at 76, 77), and his testimony therefore cannot be taken to represent Fort Dix policy.

review. They were barred from coming onto Fort Dix because they had previously attempted to distribute literature without obtaining prior approval for the distribution.

Respondents were not precluded from using other means of communicating with military personnel. They were free to employ the printed or broadcast media. They could also distribute literature to military personnel outside Fort Dix. Indeed, the Philadelphia Resistance, with which respondent Hardy is affiliated, maintained a store front near the base, in Wrightstown (I-App. 178). See n. 39, *supra*. What they could not do—and what the final order of the district court now permits—is to distribute on nonrestricted areas of Fort Dix literature posing a clear danger to military loyalty, discipline, or morale.[48]

---

[48] The injunction is further improper in that it rescinds the bar order against one pamphleteer whose conduct was not protected by the First Amendment even under the rationale of the court of appeals. Plaintiff Stanton was barred from Fort Dix because he had distributed leaflets in a barracks (I–App. 9), a restricted area not open to the civilian public (*id.* at 73, 199).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-848

THOMAS U. GREER AND JAMES R. SCHLESINGER,
Petitioners

v.

BENJAMIN SPOCK, JULIUS HOBSON, SOCIALIST WORKERS PARTY, JOHN GINAVEN, DONALD MISCH, ALAN HARDY, AND ROBERT STANTON,
Respondents

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Whether the candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

2. Whether civilians who have a right to distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix can be required to submit their literature to military authorities for prior approval based on content.

COUNTER-STATEMENT OF THE CASE

1. On September 9, 1972, Benjamin Spock and Julius Hobson, candidates of the People's Party for President and Vice-President of the United States, and Linda Jenness and Andrew Pulley, candidates of the Socialist Workers Party for President and Vice-President of the United States, wrote to General Bert A. David, Commander of the Fort Dix Military Reservation, advising him that they intended "to visit Fort Dix to campaign among the servicemen and servicewomen there on September 23, 1972" (I-App. 12-13). They stated that they wanted "to distribute their literature and talk to the soldiers about the issues that concern them," and that "[i]t is not our intention to disrupt the normal functions of the base and we will of course abide by reasonable restrictions as to the time and places of our campaigning" (*id.*).[1]

General David, who was subsequently replaced by Petitioner Thomas U. Greer, replied on September 18, 1972, denying the candidate respondents permission to visit Fort Dix for the purpose of making "political speeches" or distributing literature "without prior approval" (*id.* at 14-15). He advised them that their entering Fort Dix for these purposes would violate Fort Dix Regulations 210-26 and 210-27 and 18 U.S.C. §1382, interfere with the military mission, and "give the appearance that you or your campaign is supported by me in my official capacity" (*id.*).

On September 21, 1972, candidates Spock and Pulley, through their counsel, informed General David that they intended to enter Fort Dix at the Wrightstown Road entrance on September 23, 1972 to discuss with him his decision denying their request and to campaign (*id.* at 7, 36). The Wrightstown Road entrance to Fort Dix is only

1. They also referred to a recent decision in the New Jersey state courts that allows military personnel stationed in New Jersey to register and vote there (I-App. 12). Petitioners encourage military personnel to vote (*id.* at 59), and the Socialist Workers Party and Peoples Party candidates were on the ballot in New Jersey (*id.* at 99).

several feet from the commercial district of Wrightstown, New Jersey (*id.* at 162; depicted in the photographic exhibit[2] at II-App. E-2), and, like the other entrances to Fort Dix, has no guards, gates, barriers, or other impediments to free access by the public (I-App. 66-68, 24, 52-53, 162-63, 200). However, on that day, a representative of the Commander was at the Wrightstown Road entrance and refused to admit respondents to the base (*id.* at 7-8, 36).

On September 29, 1972, the four minor party candidates, four other civilians, and the Socialist Workers Party brought this action concerning their rights to speak and distribute literature without prior approval in the areas of Fort Dix that are open to the public. The four additional civilians, Respondents John Ginaven, Donald Misch, Alan Hardy and Robert Stanton, had been ejected from Fort Dix and issued letters barring their reentry for peacefully distributing unapproved literature on the base (*id.* at 7-8, 36-37). Respondents did not question, and do not now question, the power of the petitioners to close all or a portion of the base or to regulate the time, place and manner of exercise of First Amendment rights on open portions of the base. Respondents' claim was and is based on the longstanding principle that in government controlled areas to which the public has free and open access, particularly open areas like streets, sidewalks and parks, the government may not prohibit all exercise of First Amendment rights or selectively prohibit exercise of such rights based on content (*id.* at 4-11).

2. Fort Dix is a military facility primarily devoted to the training of soldiers (*id.* at 27). Access to Fort Dix is

2. This photograph, taken from within the base, depicts Respondents Ginaven and Misch distributing literature on a sidewalk on the base just before their arrest and ejection (I-App. 160-61). The base begins just outside the commercial district of Wrightstown, New Jersey, approximately at the railroad crossing sign depicted in the photograph behind Respondents Ginaven and Misch (*id.* at 162). There are no gates; brick mounds on both sides of the street, not visible in the photograph, mark the boundary (*id.* at 163).

freely open to the public except in a few, relatively small restricted areas. The evidence presented by the respondents in the district court, which was unrebutted,[3] shows that the open portions of Fort Dix are essentially indistinguishable from the surrounding areas in New Jersey except that they are controlled by military rather than civilian authorities. Except where noted, the references to the record made in the following discussion are references to the testimony of two colonels, Jasper R. Johnson, Director of Personnel and Community Activities, and Vincent I. Olsen, Provost Marshal, who appeared pursuant to respondents' subpoena of General David or his representative (*id.* at 41, 66).

Ten entrances to Fort Dix, and several additional foot paths, have no guards, sentries, barriers, gates or other impediments to free and open access by civilians (*id.* at 66-68, 24, 52-53, 62-63, 200). "[C]ivilians are authorized on the post" (*id.* at 66). With the exception of the restricted areas, where First Amendment rights were not claimed, civilians can pass through, visit, tour the base, walk around, ride around, talk to military personnel, eat at the cafeteria, enter for any reason or no reason at all—without being questioned, stopped, or hindered in any way (*id.* at 66-71, 61, 73, 82-83, 185).[4] The base is crisscrossed by New Jersey state and county roads that are civilian thoroughfares (*id.* at 68). Public buses freely enter and leave the base, picking up and discharging civilians without being monitored or controlled (*id.* at 68-69).

Civilians are regularly allowed to address various sized gatherings of military personnel and their dependents on a wide variety of topics. Businessmen come to speak to

3. Petitioners did not present any testimony but relied on the testimony of two colonels subpoenaed by respondents as representatives of General David and on two affidavits that are in accord with that testimony.

4. Donald Campbell, a private in training at the base, testified that during his orientation period, he and the other soldiers were told by their sergeants that the base is open and that it is sometimes dangerous at night because so many civilians freely enter (*id.* at 102-103).

soldiers about business management principles (*id.* at 51-52, 55). Up to 500 listen to religious talks at the chapel (*id.* at 54-55). People from the surrounding community come in to discuss "emergency preparedness" (*id.* at 55-56). Civilians address gatherings of 50 soldiers about drug abuse (*id.* at 56). Civilians visit fairly regularly to convey various types of information (*id.* at 56-57). Some door-to-door distribution of literature is allowed (*id.* at 80). Civilians have informal discussions, individually or in groups, with military personnel on a wide variety of topics (*id.* at 55-57, 71); a civilian speaking to a few soldiers on the sidewalk in front of the main PX is so common that Colonel Olsen did not think it would be noticed (*id.* at 71). There are even outdoor rock music concerts open to civilians attended by as many as 5,000 people (*id.* at 53-54).

Civilian witnesses testified concerning their experiences on the base. Dina Portnoy, who worked in Wrightstown, New Jersey, regularly went to various facilities on the base, including barracks and a cafeteria, without being stopped or questioned (*id.* at 86-87).[5] She also regularly used the state and county roads running through the base, including New Jersey Route 68 and Texas Avenue, as thoroughfares to get from Wrightstown to a friend's home in Browns Mills, New Jersey (*id.* at 86). Sidney Stapleton rode and walked around the base for a few hours on October 5, 1972 (*id.* at 92). A soldier on duty at an information booth told him the base is open to access by the public (*id.* at 95). He ate at a cafeteria, visited the PX, bought newspapers, and went to barracks (*id.* at 92-95). He stopped at one entrance to the base and counted fifty-three non-military vehicles (without military decals) going in and out in fifteen minutes; most of the traffic was non-military (*id.* at 94-95).[6]

5. Her civilian co-workers attended movies at the base theater (I-App. 87).

6. There was a stenographic mistake at page 102 of the notes of testimony of the initial hearing that was formally corrected by the stenographer but still appears at I-App. 95. Mr. Stapleton testified that most of the traffic was "non-military," not "military,"

Military personnel in training, who are prohibited from leaving the base for the first half (four weeks) of their training period, have off-duty time in the evenings and on weekends, which increases as their training period progresses (*id.* at 27, 28, 50, 101 (Private Donald Campbell)). They can use this time to read books, newspapers, and other periodicals, which are readily available in a library and at stores, watch television (there is one in each barracks), listen to radio, play sports, or just relax (*id.* at 43, 60). Discussion of the important issues of the day among the soldiers is "quite common" (*id.* at 43-44). Private Donald Campbell, in training at the base, testified that there is considerable leisure time, during which he had read four books in the last three weeks, and that the soldiers have time to hear addresses by candidates (*id.* at 101-103).

Written materials and media available on the base contain partisan and somewhat varied viewpoints (*id.* at 60, 61). The October 5, 1972 issue of *Army Times*, a newspaper generally available on the base, had a full page ad urging the re-election of President Nixon which Colonel Johnson found "very partisan" (*id.* at 44-46; ad reproduced at II-App. E-3). The views and positions of the other major party's candidates are also available on the base (I-App. at 63). However, not all viewpoints, periodicals, literature, speeches, or candidates are allowed to be seen or heard; they are screened on the basis of content. Colonel Johnson was asked:

> "Q . . . isn't it true that the content of what a proposed visitor intends to say is the basis for whether

as appears on that page. Counsel for respondents referred to this testimony the correct way in his summation before the district court (*id.* at 114) and noted the mistake in his briefs before the court of appeals. When counsel for petitioners indicated in his brief before the court of appeals that he was not sure which way was correct, respondents asked the stenographer to review her tapes. After reviewing the tapes, the stenographer determined that Mr. Stapleton said "non-military," and she filed a correction with the court of appeals, a copy of which was sent to petitioners' counsel.

he is allowed to come on or not? If, for instance, he says, 'I intend to urge the soldiers not to use drugs,' that, from what you have said, would be something that the Base might favorably look on. If he is going to inform them of some management principle that they are not aware of—

"A That would further our mission, yes.

"Q But if they are to speak against the war in Vietnam—

"A That certainly wouldn't forward our mission, would it?

"Q So the content of what they are to say, that is the basis of whether or not they are approved?

"A Yes, to a great extent." *Id.* at 64.

Newspapers and leaflets are also approved or disapproved for distribution on the base according to their content (*id.* at 70, 76-77). Colonel Olsen testified that a newspaper not on the "approved" list has to be submitted for approval before it can be sold at base stores (*id.* at 76-77). "If it's a paper that is wrong," it will not be approved (*id.* at 77). The views and positions of minor party candidates are not available on the base (*id.* at 103, 63, 93).[7] Petitioners' repeated statement that permission to distribute literature on the base "would be denied only in regard to publications that clearly threaten military discipline or morale" (Pet. Brief 2, 43, 47) has meaning only if one wishes this Court to resolve the important issues in this case without consideration of the record.[8]

7. Private Donald Campbell, who looked through the media materials available at his company's PX and the reception station PX, did not find "anything about any of the presidential candidates except for the major ones, the Democrats and Republicans" (I-App. at 103). Neither Colonel Olsen nor a civilian, who looked through the literature available at the main PX, saw any literature concerning minor party candidates (*id.* at 63, 93-94).

8. For additional testimony indicating that all forms of speech are censored based on content, see I-App. 62, 69-70, 76-

Petitioners' regulations and practices left respondents without any means of reaching the soldiers at Fort Dix, whom they regard as a uniquely important audience for their views and campaigns. Fred Halstead, a member of the National Committee of the Socialist Workers Party, testified:

> "We think we have a position on issues of particular importance to GI's, particularly on the war. I don't know anybody who has a better right to have an opinion on the war, to express that opinion, and to make an intelligent decision on it based on hearing all points of view . . .
>
> ". . . We don't get much radio and TV time. We don't have the money for it. We very rarely are reported in the major press. . . .
>
> "Our main way of reaching people in our campaigns is distributing leaflets, speaking to them personally, organizing meetings to which we invite them, going to the places where they are and speaking to them . . . ." I-App. 97-98.

3. The District Court found that "[t]he roads leading into Fort Dix are not covered by guards or barriers" (Pet. App. 3a) and there is "a great volume of both civilian and military vehicular traffic" (*id.* at 4a). Without negating the openness of the base pursuant to this Court's decision in *Flower* v. *United States*, 407 U.S. 197, the district court denied relief based on its interpretation of the term "abandoned" in the *Flower* decision. In *Flower*, the Court said that since New Baunfels Avenue on Fort Sam Houston was open to the public, "the military has abandoned any claim that it has special interests in who walks, talks, or leaflets on the avenue." 407 U.S. at 198. The district court inter-

77, 154-55 (concerning the *Fort Dix Post*), 156-57 (concerning the *Army Times*), 192-93, 195-96 (concerning materials at post exchanges).

preted this statement to mean that First Amendment rights may be exercised by civilians only on portions of a military base that are not only open to the public but also have been abandoned in the sense that the military has left them unattended and uncontrolled. The court said:

> "In this case, the Command has not 'abandoned' control over any part of Fort Dix. Although civilian vehicles are allowed across some four of its roads, [9] the Military Police has jurisdiction and authority over all criminal offenses and traffic violations throughout the base and as the testimony of the Provost Marshal discloses, exercises it.
>
> "Therefore, in my view, *Flower*, *supra*, was never intended to apply to the situation of which we are here involved." Pet. App. 7a-8a.

While the military patrols the open areas of Fort Dix, the district court said that in *Flower* "[t]here is nothing in the two opinions [of the Fifth Circuit and this Court] which would indicate any control of New Braunfels Avenue by the military" (*id.* at 5a). However, the street where Flower was arrested was part of the base and was so marked, and his arrests there by military police on two occasions (for distribution of unapproved leaflets) indicate that the military was patrolling and exercising control over that area. Moreover, the district court misinterpreted the *Flower* decision; in *Flower* the Court held that the military had "abandoned" the right to prohibit exercise of First Amendment rights, not control over the base.[10]

4. The court of appeals reversed and directed that the candidate plaintiffs be granted preliminary injunctive

9. The uncontradicted testimony of Colonel Olsen, the Provost Marshal, indicates that there are ten open entrances as well as a number of open footpaths (I-App. 68).

10. This question was discussed by the court of appeals at Pet. App. 24a.

relief.[11] Holding that the findings of the district court were "clearly erroneous" (Pet. App. 22a), the court concluded that:

> "The record establishes that Fort Dix, a reservation of over fifty-five square miles, is crossed by ten paved roads, including a major state highway, Route 68, on all of which unrestricted vehicular traffic, civilian as well as military, is permitted at all times . . . . Busses, operated as common carriers, use the roads on the base. They pick up and discharge passengers, civilian and military. Civilians are authorized on the post. There are numerous employed civilians. Business concessions are conducted on the post. Civilians are welcome to visit soldiers. Tourists are welcome. Entertainments are occasionally provided at which as many as 5,000 people may congregate at a sports arena on the post . . . . One can visit the post for any reason at all, or no reason at all, except apparently, to campaign for political office or to distribute unapproved leaflets. The gate at which candidates Spock and Pulley were stopped is on the Wrightstown Road, about five feet from the commercial district of Wrightstown. It is normally open and unguarded, but was apparently guarded by representatives of defendant David on September 23, 1972, in anticipation of the visit. A traffic count taken in 1970, the most recent available, disclosed a daily vehicle count of 66,000 vehicles . . . . Fort Dix, when compared to Fort Sam Houston, is *a fortiori* an open post." *Id.* at 22a-24a.

11. The pamphleteer plaintiffs were denied preliminary relief because their claim was not as immediate and it was not as clear that they could satisfy the jurisdictional amount requirement of 28 U.S.C. §1331 (Pet. App. 29a-30a). At the final hearing and appeal, the question of jurisdictional amount, which became the primary issue, was resolved in favor of the pamphleteers as well as the candidates. See Point 7 of this section, *infra*.

With regard to campaign speeches and the requirement of prior approval of literature, the court said:

> "The record makes clear that almost the world-at-large, with the exception of political candidates, is free to come on the base and talk to persons living and working there. The record makes clear that large assemblies occasionally take place. Thus we cannot find that distribution of leaflets, face to face campaigning, or even the holding of meetings would *per se* be disruptive of the mission of the facility. The military authorities have themselves decided otherwise.
>
> "* * *
>
> ". . . [B]ar orders have . . . been issued for distributing 'unauthorized publications.' Unauthorized publications are those which have not been submitted to and approved by the Adjutant General, and his approval or disapproval depends upon the content of the message. A more vivid instance of a prior restraint on activities protected by the first amendment can hardly be imagined." *Id.* at 24a-26a.

5. Petitioners' application to this Court for a stay was denied (*id.* at 33a), and pursuant to the mandate of the court of appeals, a preliminary injunction was issued by the district court (*id.* at 34a). Negotiations between the parties resulted in an order of the district court specifying the times and places for distribution of literature and a campaign address by the candidate plaintiffs (*id.* at 36a-38a).

6. Leaflets announcing the campaign visit were distributed on the open areas of the base, at the times and places specified by the order, without even a minor incident (I-App. 172). The person in charge of the leafletting described the reception given the leafleteers as "friendly" (*id.* at 172). The rally, held on a Saturday afternoon at a parking lot on the base, was attended by 150 to 200 persons, including 60-75 civilians (*id.* at 172-74, 180, 182). Colonel

Olsen, testifying at the final hearing, was asked if there was "any trouble" at the rally, and he responded, "None that I recall" (*id.* at 184). The court then asked him if there were any "disturbances," and he testified, "None whatsoever" (*id.*).

7. After a final hearing, the district court issued a permanent injunction in favor of candidates Spock and Hobson[12] and the four pamphleteers, all of whom are respondents here, concerning the public streets, sidewalks and parks in the open areas of Fort Dix (Pet. 44a-46a).[13] Petitioners were enjoined from: (1) interfering with political campaigning and distribution of literature, subject, of course, to regulation of the time, place and manner; (2) requiring prior approval of the contents of any communication; (3) enforcing Fort Dix Regulations 210-26 and 210-27 insofar as they prohibit political speeches or distribution of literature without prior approval of the content; and (4) issuing bar notices based on the constitutionally protected activity described in the order (*id.* at 44a-45a). Petitioners' claim that First Amendment rights are incapable of valuation and therefore nonjusticiable pursuant to 28 U.S.C. §1331, the main issue raised by petitioners at the final hearing, was rejected (*id.* at 442).[14] The court of appeals affirmed the final order of the district court in its entirety (*id.* at 47a-56a).

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12. The complaint was dismissed as to candidates Jenness and Pulley because they were below the minimum age for the offices they sought (Pet. App. 40a-41a, 46a).

13. All of the areas involved in this litigation and covered by the injunction are public streets, sidewalks and parks. See note 20, *infra*.

14. Petitioners strenuously argued in the courts below that violation of First Amendment rights could never satisfy the jurisdictional amount requirement in 28 U.S.C. §1331, a position that could have the effect of barring any suits to redress deprivation of First Amendment rights by federal officials. Petitioners have not raised the issue in this Court.

SUMMARY OF ARGUMENT

I.

The court of appeals ruled that the candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix. The court's decision was based on the following facts: (1) "almost the world-at-large" has regular, free and open access to Fort Dix; (2) civilians enter the base to talk to military personnel, individually or in small groups, on any subject; (3) civilians address gatherings of military personnel on a variety of issues; (4) these gatherings include "large assemblies" held outdoors and open to civilians; (5) the partisan political viewpoints and campaigns of the major party candidates are heard throughout the base; (6) exercise of First Amendment rights is approved or disapproved based on content; and (7) civilians "can visit [Fort Dix] for any reason at all, or no reason at all, except apparently, to campaign for political office or to distribute unapproved leaflets" (Pet. App. 21a-29a).

Petitioners challenge the ruling of the court of appeals on a number of grounds, including a claim that, contrary to *Flower* v. *United States*, 407 U.S. 197, no civilian may exercise First Amendment rights on any portion of any military base, regardless of the openness of the base, the nature and uses of a particular area, the imposition of selective restrictions on speech based on content, or anything else.

Petitioners analysis and arguments are based on an asserted dichotomy between "public streets, sidewalks and parks," where First Amendment rights may be exercised, and "military bases," where petitioners claim that no First Amendment rights may be exercised. However, the areas in which respondents were granted the right to speak and distribute literature are public streets, sidewalks and parks. The issue is whether these public streets, sidewalks and parks, although open and freely used by civilians for speech

or any other purpose, should be exempt from all political speech, or from political speech of which petitioners disapprove based on content, because they are controlled by military rather than civilian authorities.

There are three basic questions involved in analyzing and resolving this issue: (1) whether the areas of Fort Dix in question are open to the public; (2) whether civilians have a right to speak and distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix; and (3) whether the candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

A.

The unrebutted evidence presented by respondents demonstrates that the areas in which respondents were allowed to exercise First Amendment rights are essentially indistinguishable from the surrounding civilian areas in New Jersey and are open to the public for any or no reason. Petitioners' suggested distinctions of *Flower* on the question of openness have no merit. In both *Flower* and this case, the overall military facility is primarily dedicated to military purposes, but the particular areas in question are not the situs of any activity other than the usual activities that take place on streets, sidewalks and parks. Similarly, in both *Flower* and this case, the military exercises control over and patrols the areas in question.

B.

In resolving the conflict of constitutional rights and governmental interests presented when a government regulation or practice infringes on First Amendment freedoms, the Court has evaluated the legitimacy and importance of the governmental interest involved. The Court has not based its analysis on the overall or generalized governmental interest in an institution or facility but rather has assessed the government's interest regarding the specific place and activity in question.

In this case, relief was not granted as to a "military base" but as to specific, open streets, sidewalks and parks. These public streets, sidewalks and parks are indistinguishable in terms of their nature and uses from the same facilities maintained by a city or county. We are not here concerned with First Amendment activities that may, because of their nature or location, interfere with government facilities or functions.

It is indicative of the lack of any peculiarly military interest that the justifications for petitioners' regulations and practices raised by military authorities in their testimony before the district court are the same justifications frequently raised by civilian authorities: speech presents a vague, conjectural possibility of disruption and respondents' views are contrary to theirs.

Petitioners' claims that speech might cause disruption or undermine morale and discipline have no concrete basis and are difficult to take seriously when petitioners do not censor exposure of soldiers to the mass media or to any civilian who wishes to enter the base and when "[m]embers of the military are, of course, continually exposed to the clash of political ideas" (Pet. Brief 40).

Petitioners have no legitimate, concrete military interest concerning these areas that is different from or rises above any governmental entity's interest in what happens on its public streets. There is no reason to depart from the usual rule that in government controlled areas to which the public has free and open access, particularly areas such as streets, sidewalks and parks, the government may neither prohibit all First Amendment activities by civilians nor selectively prohibit such activities based on content.

C.

In addition to petitioners' assertions concerning exercise of First Amendment rights by civilians generally, petitioners claim that speech by or on behalf of a candidate for elective office would violate the political neutrality of the military.

However, allowing various views and candidates to be heard does not constitute support of them or a violation of neutrality. In a free society, neutrality means allowing issues to be aired and conflicting views on them to be expressed.

Furthermore, petitioners allow wide and open distribution of some partisan materials and views at Fort Dix, in the mass media and publications such as *Army Times*. Petitioners regulations and practices are not neutral, either in the sense that all candidates and parties are heard or that none are heard.

Petitioners cannot selectively prohibit, on the basis of content, political speech by civilians whose message concerns a minor party candidacy while they allow speech by civilians whose message is non-political or political but not concerned with elections, particularly when they make available the partisan campaign views and activities of the major party candidates and encourage military personnel to vote. In our society, soldiers have a right to vote and a right to hear all the candidates and make up their own minds. Petitioners have no legitimate military interest in determining which campaigns and candidates will be heard by soldiers.

II.

The court of appeals ruled that civilians who have a First Amendment right to distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix cannot be required to submit their literature to military authorities for prior approval based on content.

This Court has never approved a prior restraint on constitutionally protected speech on public streets, sidewalks and parks. Petitioners claim that the lack of a system of prior restraint would pose an unexplained threat to morale and discipline at Fort Dix. However, if such a threat exists and petitioners take it seriously, it is difficult to understand why they allow the soldiers at Fort Dix to be exposed to uncensored mass media and to the views of any civilian who wishes to enter the base. We are not a nation that considers its soldiers second class citizens who can be isolated from exposure to the important societal issues of the day and indoctrinated with the beliefs of military leaders. Petitioners have no legitimate military interest in imposing a system of prior restraint.

Furthermore, the particular system of prior restraint at Fort Dix lacks the precise and narrow standards and procedural safeguards required for a valid prior restraint concerning even constitutionally unprotected speech.

ARGUMENT

I.

The candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

It has long been established that in government controlled areas to which the public has free and open access, particularly open areas such as streets, sidewalks and parks, the government may neither prohibit all First Amendment activities nor selectively prohibit such activities based on content. E.g., *Lovell* v. *Griffin*, 303 U.S. 444; *Hague* v. *CIO*, 307 U.S. 496; *Schneider* v. *State*, 308 U.S. 147; *Thornhill* v. *Alabama*, 310 U.S. 88; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Jamison* v. *Texas*, 318 U.S. 413, 416 ("[o]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion"); *Tucker* v. *Texas*, 326 U.S. 517; *Edwards* v. *South Carolina*, 372 U.S. 229; *Tinker* v. *DesMoines Community School District*, 393 U.S. 503; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415; *Lloyd* v. *Tanner*, 407 U.S. 551, 559 ("it has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely"); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96.

Applying this principle, the Court held, in *Flower* v. *United States*, 407 U.S. 197, that First Amendment rights may be exercised by civilians on a sidewalk on a military base to which the public regularly has free and open access.[15] In this case, the court of appeals ruled that

15. The decisions of the lower courts following *Flower* demonstrate an appropriate regard for both military interests and the First Amendment. In addition to the instant case, see *United States* v. *Floyd*, 477 F.2d 217 (10th Cir. 1973); *Burnett* v. *Tolson*, 474 F.2d 877 (4th Cir. 1973); *CCCO-Western Region* v. *Fellows*, 359 F. Supp. 644 (N.D. Calif. 1972); *Jenness* v. *Forbes*, 351 F. Supp. 88 (D.R.I. 1972). See also *McGraw* v. *Farrow*, 472 F.2d 952 (4th Cir. 1973).

In *Burnett* v. *Tolson*, the Fourth Circuit found that Fort Bragg is open to the public, with civilians having free access to shopping areas, the post exchange, and motion picture theatre, and that the plaintiffs therefore had a right to "enter the public areas of Fort Bragg as leafleteers." 474 F.2d at 881.

The Tenth Circuit, in *United States* v. *Floyd*, held that Tinker Air Force Base is not open pursuant to the test in *Flower*. Tinker was posted with a large sign which reads: "WARNING. U.S. AIR FORCE BASE. IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE COMMANDER TINKER AIR FORCE BASE . . ." 477 F.2d at 223. Five security guards were posted at the entrance, and a fence surrounded the entire installation.

Respondents Spock and Hobson, minor party candidates for national office, have a First Amendment right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

Petitioners challenge the decision of the court of appeals on a number of grounds, including a claim that, contrary to *Flower*, civilians cannot exercise First Amendment rights on any portion of any military base, regardless of the openness of the base, the nature and uses of a particular area, the imposition of selective restrictions on speech based on content, or anything else (Pet. Brief 25, 28-33). In the following discussion, we have separated the general issue and petitioners' various arguments into three subissues, and we argue that: (1) the areas of Fort Dix in which respondents were allowed to exercise First Amendment rights are open to the public; (2) civilians have a right to speak and distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix; and (3) the candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

A.

The areas of Fort Dix in which respondents were allowed to exercise First Amendment rights are open to the public.

The record demonstrates that, with the exception of the restricted areas, Fort Dix is essentially indistinguishable from the surrounding civilian areas in New Jersey. The unrebutted evidence presented by respondents shows that: there are no guards, sentries, barriers, gates, or other impediments to free and open access; civilians are authorized to enter the base for any or no reason; the base is crisscrossed by civilian thoroughfares; civilians enter and talk to military personnel, individually or in small groups, on any subject; some door-to-door handbilling is allowed; civilians address gatherings of military personnel on a variety of issues; these gatherings include large assemblies held outdoors and open to civilians.[16]

In their statement of the case (Pet. Brief 9-13) and in the footnote in which they attempt to distinguish *Flower* on the question of openness (*id.* at 34 n. 28), petitioners make several inaccurate and/or misleading statements, the most important of which are as follows:

(1) Petitioners state that "[m]ilitary police routinely stop persons on the reservation and ask them their reason for being on the post," citing the testimony and affidavit of Colonel Olsen, the Provost Marshal, at I-App. 25, 78 (Pet. Brief 11). This statement seems to indicate that civilians are stopped and questioned for no reason as a general practice, but Colonel Olsen testified quite differently. First, at I-App. 25 and 78, Colonel Olsen said that anyone acting "suspiciously" would be stopped. He added, *id.* at 25, that anyone "doing something improper or illegal . . . will be escorted to the nearest gate." See also *id.* at 69-70. Moreover, in testimony that petitioners failed to quote or cite,

16. The evidence is discussed in detail at pp. 2-8, *supra*.

Colonel Olsen indicated that "civilians are authorized on the post" (*id.* at 66), that they can come on the base or pass through for any reason or no reason without being stopped (*id.* at 66-68), that civilians are not routinely stopped or questioned (*id.* at 69), and that stops and arrests on the base are made on the same basis as in civilian communities (*id.* at 85).

(2) Petitioners state that "[f]rom time to time, military police establish roadblocks on roads within the reservation and stop all vehicles. Such stops are intended to assure that vehicles on the post are properly registered and to keep unauthorized demonstrators off the post," citing Colonel Olsen's testimony, at I-App. 79 (Pet. Brief 11). Colonel Olsen testified that roadblocks are sometimes set up because of demonstrations or to check that cars that should be registered on the base are duly registered (I-App. at 79). However, civilians are normally allowed to enter in their cars without being stopped or ejected (*id.* at 66-67).

(3) Petitioners state that "'No trespassing' signs are conspicuously posted over part of the area," citing Colonel Olsen's testimony, at I-App. 25, 78, 79 (Pet. Brief 34 n. 28).[17] This statement fails to indicate that Colonel Olsen testified, at I-App. 25, 78, 79, that such signs are only posted along boundaries of the base that are unfenced and otherwise unmarked, not at the entrances. Colonel Olsen also testified that ten entrances to Fort Dix, as well as a number of footpaths, have no guards, sentries, barriers, gates, or other impediments to free and open access by civilians (*id.* at 66-68). See also *id.* at 24, 52-53, 162-63, 200; photographic exhibits of two of the main entrances, II-App. E-2 (Wrightstown entrance), E-4 (New Jersey Route 68, with the sign "Visitors Welcome").

Petitioners' suggested distinctions of *Flower* on the question of openness have no merit. Petitioners claim that,

17. Petitioners more accurately referred to this testimony in their statement of the case (Pet. Brief 12).

unlike the area of Fort Sam Houston involved in *Flower*, "the areas of Fort Dix open to the public" are "dedicated primarily to military purposes" and patrolled by military authorities (Pet. Brief 34 n. 28).

In both *Flower* and this case, the overall military facility is primarily dedicated to military purposes, but the particular areas in question are freely open to civilians and are not the situs of any activity other than the usual activities that take place on streets, sidewalks and parks. The street and sidewalk involved in *Flower* and the streets and sidewalks involved in this case are both primarily dedicated to use by military and civilian personnel in getting from one place to another. There is no difference in this regard, and Petitioners offer no citation to the record or any evidence that would indicate a difference.

Similarly, in both this case and *Flower*, the military exercises control over and patrols the areas in question. Petitioners, like the district court,[18] seem to assume that the street involved in *Flower* was not patrolled by military authorities and that this Court's decision was based on that fact, but Flower's arrest there by military police on two occasions (for distribution of unauthorized literature) indicates quite clearly that the street was patrolled by military authorities.[19]

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18. See Pet. App. 7a-8a, discussed *supra*, at pp. 8-9.

19. Petitioners attempt to distinguish *Flower* on two additional grounds (Pet. Brief 34 n. 28). First, petitioners state that *Flower* is distinguishable because the speech involved there was directed at civilians while here it is directed at military personnel. However, Flower's leaflets were apparently directed at anyone who would take one. *United States* v. *Flower*, 452 F.2d 80, 82, 90-91 (5th Cir. 1972). In any event, petitioners do not discuss the significance of this asserted distinction; if it has any significance, it would seem to lend additional support to respondents' claim since their message is directed at and concerns the specific audience they seek to reach. See *Lloyd* v. *Tanner*, 407 U.S. 551, 562.

Finally, petitioners claim *Flower* is distinguishable because respondents' speeches held pursuant to the district court's order

The record in this case demonstrates more thoroughly than the record in *Flower* that the areas in question are open to the public and that the military has "abandoned any claim that it has special interest in who walks, talks, or distributes leaflets" there. 407 U.S. at 198.

B.

Civilians have a right to speak and distribute litarature on the public streets, sidewalks and parks in the open areas of Fort Dix.

Petitioners, throughout their brief, pose a false dichotomy concerning the question of whether any civilians should have been allowed to exercise First Amendment rights in the open areas of Fort Dix. The Court is repeatedly asked to compare "public streets, sidewalks and parks"—where First Amendment rights clearly may be exercised (Pet. Brief 27-28) —to "military bases"—where petitioners urge the Court to suspend the First Amendment, without regard to the openness of the base, the nature and uses of a particular area, the imposition of selective restrictions on speech based on content, or anything else (*id.* at 25, 28-33).

However, the areas in which respondents were granted the right to speak and distribute literature *are* public streets, sidewalks and parks.[20] Military authorities are

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were on a parking lot as opposed to a sidewalk. However, the parking lot location, arrived at as the result of negotiations between the parties, is surely in the nature of and not significantly different from streets, sidewalks and parks.

20. Although the First Amendment rights of civilians at Fort Dix may extend beyond the scope of this litigation, the only areas in question here are the public streets, sidewalks and parks on which respondents won the right to engage in face-to-face speech and distribution of literature. The candidate respondents were granted use of streets, sidewalks and parks, including a parking lot. Respondents Ginaven and Misch distributed literature on a sidewalk (I-App. 8, 89-92, 160-61). Respondent Hardy distributed

in control of the areas in question, but "military base" does not describe the *nature* or *uses* of these areas; they are public streets, sidewalks and parks, which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague* v. *CIO*, 307 U.S. at 515. The issue is whether these public streets, sidewalks and parks, although open and freely and regularly used by civilians for speech or any other purpose, should be exempt from all political speech, or from political speech of which petitioners disapprove based on content, because they are controlled by military rather than civilian authorities. We have discussed this issue, first, in this section, with regard to speech by civilians that is political in the sense that it concerns various social, economic and political issues, and second, in the next section (Point IC), with regard to political speech by civilians that specifically concerns candidates and campaigns for elective office.

This Court's decisions establish standards for analyzing and resolving the conflict of governmental interests and constitutional imperatives presented when a government regulation or practice infringes on First Amendment rights.[21] E.g., *Southeastern Promotions* v. *Conrad*, 95

leaflets on a parking lot (*id.* at 36). Although Respondent Stanton distributed literature in a barracks (*id.* at 9, 37, 87-89), barracks were defined by petitioners as "restricted" areas (*id.* at 73), and therefore no relief was granted as to them (Pet. App. 30a-31a, 34a). Respondents did not challenge or appeal from this determination or present evidence or argument concerning any indoor areas or outdoor areas designated as restricted by petitioners.

21. In *United States* v. *O'Brien*, 391 U.S. 367, 377, the Court identified four basic considerations:

". . . if [the government regulation] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

S.Ct. 1239; *Pell* v. *Procunier*, 417 U.S. 817; *Procunier* v. *Martinez*, 416 U.S. 396; *Tinker* v. *DesMoines Community School District*, 393 U.S. 503; *United States* v. *O'Brien*, 391 U.S. 367; *Adderly* v. *Florida*, 385 U.S. 39. See also *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (Frankfurter, J., concurring). This analysis begins with an assessment of the precise governmental interest involved and a determination of the legitimacy and importance of that interest. E.g., *Procunier* v. *Martinez*, *supra*; *Healy* v. *James*, 408 U.S. 169; *Tinker* v. *DesMoines Community School District*, *supra*; *Adderly* v. *Florida*, *supra*; *Cox* v. *Louisiana*, 379 U.S. 559; *Edwards* v. *South Carolina*, 372 U.S. 229.

In this case, the government's interest is not nearly so broad or important as petitioners claim. Relief was not granted as to a "military base" but as to specific, publicly owned and controlled streets, sidewalks and parks which military authorities have decided to maintain wholly open to the public.[22] Petitioners frame the issue as a question of whether a "military base" is a "public forum," evoking, explicitly at one point, images of a Hyde Park in the midst of training exercises, or on the steps of this Court's building (Pet. Brief 32-35). The issue thus framed, petitioners go on to suggest that "history and tradition" determine where First Amendment rights may be exercised and that there is no history or tradition of their exercise on military facilities (*id.*).

If the history and tradition of an area were determinative in the sense that petitioners suggest, presumably *Hague* v. *CIO*, *Lovell* v. *Griffin*, and all of the related decisions of this Court vindicating First Amendment rights

22. Petitioners agree that "[p]ublic streets, sidewalks and parks are thus recognized by the Court as areas where the public has a right to engage in free speech. Historically, these are the traditional places for such activity and, although the state may impose reasonable regulations regarding time, place and manner in order to preserve the primary purposes of the areas, it cannot absolutely bar the public from using such places as public forums" (Pet. Brief 28).

would have been differently decided. In each of those decisions, the Court compelled a change in tradition regarding the exercise of First Amendment rights in the areas in question. In any event, notwithstanding petitioners' statements to the contrary, there is a history and tradition of exercise of First Amendment rights by civilians on portions of military facilities otherwise open to the public. See *Tucker* v. *Texas*, 326 U.S. 517; *Flower* v. *United States*, *supra*.

Furthermore, this Court has not analyzed governmental interests in terms of the government's generalized or overall interest in an institution or facility. For example, the Court did not evaluate the government's interest concerning "schools" in *Tinker* v. *DesMoines Community School*, *supra*, or concerning "prisons" in *Procunier* v. *Martinez* and *Pell* v. *Procunier*, both *supra*. Rather, the Court has evaluated the government's specific interest regarding the particular place and activity in question.

We are not here concerned with First Amendment activities that may, because of their nature or location, interfere with government facilities like a courthouse, see *Cox* v. *Louisiana*, 379 U.S. 559, or a jail, see *Adderly* v. *Florida*, 395 U.S. 39. In this case, there is no such facility or competing governmental function in the areas in question. These are open, public streets, sidewalks and parks, some of which are integrated with civilian urban areas, like Wrightstown, New Jersey, and others of which are, like most of the surrounding area, more rural.

These streets, sidewalks and parks, maintained as public facilities by the military at Fort Dix, are indistinguishable in terms of their nature and uses from the same facilities maintained by a city or county. Speech and leafletting are not the primary purpose of any street or sidewalk; they are primarily dedicated to a competing use, as thoroughfares on which people go from one place to another.[23] Petitioners have no legitimate, concrete

23. Petitioners argue that First Amendment rights may only be exercised where the "purpose" of the area is "to provide a public forum" (Pet. Brief 29-30). However, provision of a public forum is not the purpose of any public street, sidewalk or park, and petitioners' position is directly contrary to the long and consistent line of decisions starting with *Lovell* v. *Griffin*, *Hague* v. *CIO*, and *Schneider* v. *State*, all *supra*.

military interest—based on military needs or security—that is different from or rises above any governmental entity's interest in what happens on its public streets. The fact that these public streets, sidewalks and parks are militarily controlled would, of course, affect the "kinds of regulations of time, place and manner that are reasonable," *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-17, but it does not provide justification for a total prior restraint on exercise of First Amendment rights by civilians.

It is indicative of the lack of any peculiarly military interest that the justifications for the total ban on political speech raised by the commander's representatives are the same justifications frequently raised by civilian authorities. Colonel Johnson and Colonel Olsen were asked to explain how political speech and leafletting on the open streets, sidewalks and parks would "interfere with our training and other military missions," as General David had said in his initial response to respondents' request to campaign at Fort Dix (I-App. 15). They did not refer to or even mention any specific or concrete interference with the training mission, nor is there any reference to such interference in the record or in petitioners' brief. Rather, they referred to interference that, they asserted, would result because speech presents the possibility of disruption (*id.* at 43-46, 53-54) and because respondents' views are contrary to theirs (*id.* at 64, 70, 76-77).[24]

Colonel Johnson testified that face-to-face expression of some views might result in disruption (*id.* at 48, 50-51). He did not, however, feel that way about expression of the views of the major party candidates or about an outdoor

24. General David and Colonel Johnson also claimed that speech by these minor party candidates would violate the neutrality of the military (I-App. 15, 42), which is discussed in Point IC, *infra*.

rock concert attended by 5,000 military personnel and civilians (*id.* at 43-46, 53-54). The record indicates that respondents' campaign speeches and leafletting were in fact not disruptive (*id.* at 172, 184). This asserted justification boils down to a vague, conjectural possibility that political speech might be disruptive.

The First Amendment constitutionalizes the judgment that speech is worth its "price" and the wisdom that more disruption results from the suppression of dissent than from its airing. The possibility of disruption can be minimized—as it is by federal, state, and local authorities throughout the country—by regulation of the time, place and manner of exercise of First Amendment rights. Moreover, petitioners have wholly adequate means for remedying disruption or illegal activity by civilians or military personnel without imposing a prior restraint on speech. See *Parker* v. *Levy*, 417 U.S. 733; 18 U.S.C. 1382, 2387.[25] And petitioners are very willing to tolerate other events having a more distinct possibility of disruption for purposes of which they "approve."

No restriction on First Amendment freedoms can be "greater than is essential to the furtherance of [an important or substantial] interest." E.g., *Procunier* v. *Martinez*, 416 U.S. 396, 411; *United States* v. *O'Brien*, 391 U.S. 367, 377. See also *Edwards* v. *South Carolina*, *supra*; *Police*

25. 18 U.S.C. §2387(a) provides:

"Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:

"(1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

"(2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ."

Department of Chicago v. *Mosley*, *supra*. The Court has repeatedly emphasized that:

> "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear . . . . [The government must demonstrate] something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

Tinker v. *DesMoines Community School District*, 393 U.S. at 508; *Police Department of Chicago* v. *Mosley*, 408 U.S. at 101; *Grayned* v. *City of Rockford*, 408 U.S. 104, 117; *Healy* v. *James*, 408 U.S. 169, 191. See also *Terminiello* v. *Chicago*, 337 U.S. 1.

Colonel Johnson also testified that petitioners selectively prohibit speech based on content:

> "Q . . . isn't it true that the content of what a proposed visitor intends to say is the basis for whether he is allowed to come on or not? If, for instance, he says, 'I intend to urge the soldiers not to use drugs,' that, from what you have said, would be something that the Base might favorably look on. If he is going to inform them of some management principle that they are not aware of—
>
> "A That would further our mission, yes.
>
> "Q But if they are to speak against the war in Vietnam—
>
> "A That certainly wouldn't forward our mission, would it?
>
> "Q So the content of what they are to say, that is the basis of whether or not they are approved?
>
> "A Yes, to a great extent." *Id.* at 64.

Newspapers and leaflets are also approved or disapproved for distribution on the base according to their content (*id.* at 70, 76-77). Colonel Olsen testified that a newspaper not on the "approved" list has to be submitted for approval before it can be sold at base stores (*id.* at 76-77). "If it's a paper that is wrong," it will not be approved (*id.* at 77).[26]

Petitioners selectively prohibit speech based on content in three ways. While any civilian may generally discuss any subject with military personnel on the base, petitioners prohibit, based on content, speech that is "political," speech that expresses a view opposed to the war in IndoChina, and, as is discussed in Point IC, *infra*, speech by or on behalf of a candidate for elective office.

> Thus, "the operative distinction is the message," and,
>
> ". . . above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. at 95.

See also *Pell* v. *Procunier*, 417 U.S. 817, 826; *Procunier* v. *Martinez*, 416 U.S. 396; *Healy* v. *James*, 408 U.S. 169, 187-88; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147; *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 ("speech concerning public affairs is more than self expression; it is the essence of self-government"); *Niemotko* v. *Maryland*, 340 U.S. 268, 272; *Thornhill* v. *Alabama*, 310 U.S. 88; *Schneider* v. *State*, 308 U.S. 147; *Stromberg* v. *California*, 283 U.S. 359, 369 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

---

26. Additional testimony indicated that all forms of speech are censored based on content. See note 8, *supra*.

Petitioners attempt to justify their selective prohibition of speech with a claim that certain viewpoints pose an unexplained threat to military morale and discipline (Pet. Brief 22, 39). However, in our society, soldiers are citizens providing a societal need, not an armed political force subject to political indoctrination by military leaders. Soldiers can hear, discuss, and consider various views, and they can vote. See *Carrington* v. *Rash*, 380 U.S. 89. Moreover, petitioners' claims that speech concerning important societal issues would undermine morale and discipline and pose a threat of disruption are hard to take seriously when they state that "[m]embers of the military are, of course, continually exposed to the clash of political ideas" (Pet. Brief 40) and they do not generally censor exposure of soldiers to the mass media or to any civilian who wishes to enter the base.

Fort Dix Regulation 210-27 and petitioners' practices do not merely impose incidental restrictions on First Amendment freedoms; rather, they are instruments of "suppression of free expression," *United States* v. *O'Brien*, 391 U.S. at 377; *Procunier* v. *Martinez*, 416 U.S. at 411. There is no legitimate, concrete military interest that would justify an unprecedented departure from the usual rule concerning public streets, sidewalks and parks.

C.

The candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

Petitioners have objected to exercise of First Amendment rights by candidates for elective office as violative of their "neutrality" (Pet. Brief 35-38) and because "certain candidates might express views that could undermine the morale, obedience, and discipline of members of the military" (*id.* at 39). The claim that the views of some

candidates may undermine morale, obedience and discipline would apply to speech by any civilians, not just candidates. We have considered that claim primarily in our discussion of the right of civilians generally to speak and distribute literature (Point IB, *supra*), and in our discussion of the prior restraint on the content of literature distributed on the base (Point IIA, *infra*). In this discussion, we have considered the claim that speech by or on behalf of candidates would violate the political neutrality of the military, the only claim that applies specifically to candidates as opposed to civilians generally, and we have assumed that civilians may generally engage in face-to-face speech and distribution of literature on the open streets, sidewalks and parks of Fort Dix.

Allowing various views to be expressed and heard does not constitute support of those views or a violation of political neutrality.[27] If petitioners' view of neutrality were accepted, then federal, state, and local authorities would be considered partisan every time they allowed anyone to exercise any First Amendment rights.[28] To the contrary, neutrality—which respondents wholeheartedly support—means allowing issues to be aired and conflicting views on them to be expressed.

Moreover, if allowing the views of candidates to be heard constitutes a violation of neutrality, then it had already been violated at Fort Dix by petitioners' allowing wide and open distribution of *some* partisan materials and views at Fort Dix. The unrebutted evidence shows that television, radio, magazine and newspaper coverage of the partisan views and activities of the major party candidates

27. The court of appeals said, ". . . it stretches credibility to assume that permitting such use would be an endorsement . . . ." (Pet. App. 27a).

28. This is not a situation where there could be "lurking doubts about favoritism, and sticky administration problems . . . in parcelling out limited space," *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304. In *Lehman*, the Court was concerned with limited space for posters on buses and a captive audience, not, the Court noted, "open spaces, [a] meeting hall, park, street corner, or other public thoroughfare," 418 U.S. at 303.

is widely and openly available to military personnel and civilians on the base, including the materials in *Army Times* discussed *supra* (see II-App. E-3). See also *Jenness* v. *Forbes*, 351 F. Supp. 88, 100-101 (D.R.I. 1972).[29]

29. After an extended litigation in *Jenness* concerning exercise of First Amendment rights by civilians (many of whom are respondents in this case) on Quonset Naval Base, the court determined that one portion of the base, located outside of a wire fence, was open and that the civilian plaintiffs could therefore exercise First Amendment rights there but not on the rest of the base. Only three days after the court's decision, the base commander, with the approval of the Department of Defense, allowed then Vice President Agnew and the Republican candidates for senator, governor, and attorney general of Rhode Island to make a campaign appearance attended by military personnel and hold a news conference on the base. A request by the Vice President's staff that the press be allowed on the base for the event was honored. Vice President Agnew's statements, including criticisms of the Democratic candidate for vice-president and a former Democratic attorney general, were fully covered and reported in the press.

The district court drew the following conclusions from these events, conclusions which we believe apply as well in the instant case:

"This incident constitutes a waiver of the argument that a significant security interest supports the prohibition on political speech. The Commander felt that there was no threat to the security of the base in allowing entry to four Republican candidates. It must follow that there is no security threat in allowing entry to two minority party candidates and their workers.

"* * *

"The Agnew visit poignantly emphasizes the validity of plaintiffs' argument that they, as minority party members, are denied access to channels of communication available to the two major parties, richer in resources of wealth, connections, and prestige. They must, plaintiffs argue, rely on face to face campaigning. Yet defendants would deny them even this morsel of campaign techniques, while making it available to major party candidates who need it less. The First Amendment does not allow the hypocrisy of defendants' 'political neutrality.'

"* * *

". . . Any meaningful military interest in enforcing the prohibition against plaintiffs has either been waived or, in reality, just does not exist." 351 F. Supp. at 100-101.

Petitioners' regulations and practices are not neutral, either in the sense that all candidates and parties are heard or in the sense that none are heard.[30] To the contrary, petitioners have exposed military personnel on the base to the views and candidates of the major parties while prohibiting exposure to respondents, who are minor party candidates with limited financial resources and no other means to reach this audience.[31] See *Lloyd* v. *Tanner*, 407 U.S. 551, 567; *United States* v. *O'Brien*, 391 U.S. 367, 388-89 (Harlan, J., concurring).

It is untenable—and impermissible—for petitioners to raise neutrality as a bar to airing minority party views when in fact they assist in publicizing the views of major party candidates. Petitioners cannot selectively prohibit, based on content, political speech by civilians whose message concerns a minor party candidacy while they allow speech by civilians whose message is non-political or political but not concerned with elections, particularly when they make available the partisan campaign views and activities of the major party candidates and encourage military personnel to vote. See *Williams* v. *Rhodes*, 393 U.S. 23; *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Police Deaprtment of Chicago* v. *Mosley*, *supra*; *Mills* v. *Alabama*, 384 U.S. 214.

In *Williams*, the Court said:

". . . the right of qualified voters, regardless of their political persuasion, to cast their votes effectively

30. Petitioners argue that they operate under the latter scheme, where no candidates are heard (Pet. Brief 39-40). However, military personnel at Fort Dix are exposed to the campaigns of the major party candidates through the major national news media and periodicals like *Army Times*. A scheme under which military personnel are barred from exposure to any candidates would raise a serious question concerning the right of military personnel to vote and receive information.

31. The lack of a practical alternative means of reaching the audience, though relevant, is not a necessary component of respondents' claim. See *Southeastern Promotions* v. *Conrad*, 95 S.Ct. 1239, 1245; *Healy* v. *James*, 408 U.S. 169, 183; *Schneider* v. *State*, *supra*.

. . . rank[s] among our most precious freedoms." 393 U.S. at 30.

Petitioners would relegate soldiers to a second-class citizenship and allow military authorities to decide, based on content, the campaigns and candidates to which soldiers may be exposed based on the military's asserted interest in shielding them from "certain candidates [who] might express views that could undermine [their] morale, obedience, and discipline" (Pet. Brief 39).[32]

Some limitations on the rights of soliders may be required by military necessity, see *Parker* v. *Levy*, 417 U.S. 733, but surely soldiers retain the right to vote and the right to receive information concerning all the candidates, not just the candidates who are "approved" by military authorities. See *Carrington* v. *Rash*, 380 U.S. 89. The training and maintenance of an effective armed force is an important military mission; however, in our society, the military mission does not include political indoctrination of soldiers by military leaders. The candidate respondents put forward positions on many social, economic and political issues, including the war in IndoChina. All of these matters, as well as the determination of who should be president and vice president, are solely civilian, not military, concerns.[33]

Military authorities cannot, on the basis of what the court of appeals appropriately called a "feigned neutrality"

32. We are not here concerned with civilians or military personnel advocating disruption or violation of the law, for which the military has completely adequate remedies. See *Parker* v. *Levy*, 417 U.S. 733; 18 U.S.C. §§1382, 2387, discussed *supra*, at p. —. The claim that certain views might undermine morale, obedience and discipline is discussed in Point IB, *supra*, and Point IIA, *infra*.

33. Although the conduct of a war is a military concern, the decision of whether we enter or continue a war is a civilian concern, and citizens do not lose their right to consider that issue when they become soldiers. The principle that the people and their elected representatives decide when and if we go to war is basic to the Constitution and the Declaration of Independence.

(Pet. App. 29a), selectively screen exposure of soldiers to the candidates for President and Vice President of the United States. Petitioners' position is not supported by any legitimate military interest.[34]

II.

Civilians who have a First Amendment right to distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix cannot be required to submit their literature to military authorities for prior approval based on content.

Fort Dix Regulation 210-27 prohibits distribution of literature "without prior approval" of military authorities.

Colonel Johnson's testimony that viewpoints and candidates opposed to the war in IndoChina interfere with the military mission (I-App. 64) is contrary to our constitutional scheme and violative of the most basic rights of civilians and military personnel.

34. The court of appeals concluded in this regard:

"The record discloses that the military permits the circulation and distribution in Fort Dix of a wide range of newspapers and magazines, and that radios and televisions are available during off-duty hours. Thus the persons living in Fort Dix are exposed to the political ideas of those candidates whose campaigns are prominent enough or well-financed enough to attract widespread media coverage. In these circumstances the antisepsis of Fort Dix Regulations Nos. 210-26 and 210-27 is hardly a neutral antisepsis. What the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough not sufficiently well-financed to attract media coverage, and who must make do with the more old-fashioned face-to-face style of campaigning. Such a feigned neutrality serves no discernable military purpose, and cannot outweigh the First Amendment rights of the minor candidates." Pet. App. 28a-29a.

While petitioners claim that this regulation and their practices are not "based on content alone" (Pet. Brief 48), content is clearly the sole focus. Distribution of literature is not *per se* prohibited; the regulation concerns only distribution of literature the contents of which have not been approved by military authorities. Moreover, petitioners' arguments in support of the regulation and their practices are based on asserted evils that could result from a message that—because of its contents—"jeopardize[s] military loyalty, discipline, or morale" (*id.* at 47).

In *Southeastern Promotions* v. *Conrad*, 95 S.Ct. 1239, 1244, the Court discussed the following elements of a prior restraint: (1) an application for permission is required; (2) review is based on content; (3) approval is dependent on affirmative action by the authorities involved; and (4) approval is "not a matter of routine" but involves "appraisal of facts, the exercise of judgment, and the formation of an opinion." All of these elements are present in this case. See Army Regulation 210-10, II-App. E-58; Army Directive on Guidance and Dissent, *id.* at E-51; Department of Defense Directive 1325.6, *id.* at E-8; Fort Dix Regulation 210-27, Pet. 5-6; I-App. 62, 64, 69-70, 76-77, 154-55, 156-57, 192-93, 195-96.

In the following two sections, we argue that no prior restraint based on content may be placed on handbills distributed on the public streets, sidewalks and parks in the open areas of Fort Dix and that, even if such a prior restraint could be constitutional, this particular system of prior restraint lacks precisely and narrowly drawn standards and minimal procedural safeguards.

A.

No prior restraint based on content may be imposed on distribution of literature on the public streets, sidewalks and parks in the open areas of Fort Dix.

Prior restraints on First Amendment rights are

presumptively invalid. E.g., *Southeastern Promotions* v. *Conrad*, 95 S.Ct. 1239; *Police Department of Chicago* v. *Mosley*, *supra*; *Kunz* v. *New York*, 340 U.S. 290; *Thomas* v. *Collins*, 323 U.S. 516; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Schneider* v. *State*, *supra*; *Hague* v. *CIO*, *supra*; *Lovell* v. *Griffin*, *supra*; *Grosjean* v. *American Press*, 297 U.S. 233; *Near* v. *Minnesota*, 283 U.S. 697.

Of course, not every prior restraint is *per se* unconstitutional; there are a few "narrowly defined exceptions," *Southeastern Promotions* v. *Conrad*, 95 S.Ct. at 1247. For example, prior restraints have been allowed in the context of regulation of obscenity in motion pictures, where the speech regulated is not constitutionally protected. E.g., *Times Film Corporation* v. *Chicago*, 365 U.S. 43; *Freedman* v. *Maryland*, 380 U.S. 51.

However, the right to speak and distribute literature in a public place has historically carried with it the corrollary right to be free of prior restraint based on content. The Court has time and again rejected any prior restraint on constitutionally protected speech or distribution of literature on public streets, sidewalks and parks. E.g., *Police Department* v. *Mosley*, *Flower* v. *United States*, *Thomas* v. *Collins*, *Cantwell* v. *Connecticut*, *Schneider* v. *State*, *Hague* v. *CIO*, *Lovell* v. *Griffin*, all *supra*.

Petitioners essentially concede that a prior restraint on distribution of literature on public streets, sidewalks and parks is invalid (Pet. Brief 46), but they do not discuss the application and import of that principle or the *Flower* decision to this case. Rather, petitioners analyze this question, as they have analyzed this entire case, in terms of an asserted dichotomy between "public streets, sidewalks and parks" and "military bases," without identifying any specific or concrete military interest concerning these public streets, sidewalks and parks that would differentiate them from similar areas controlled by civilian authorities (Pet. Brief 46-51).

Petitioners claim that the lack of a system of prior restraint based on content could pose an unexplained

threat to morale and discipline at Fort Dix (Pet. Brief 43-50). If such a danger exists and petitioners take it seriously, it is difficult to understand why they allow the soldiers at Fort Dix to be exposed to uncensored mass media and to the thoughts of any civilian who wishes to enter the base. Petitioners assert no legitimate interest in selective filtration of ideas by military authorities or any reason to believe that soldiers cannot hear and consider various viewpoints and still perform their duties. In this regard, petitioners state that "[m]embers of the military are, of course, continually exposed to the clash of political ideas" (Pet. Brief 40) without noting any consequent decay in morale or discipline.

We are not a nation that considers its soldiers second-class citizens who can be isolated from exposure to the important issues of the day and indoctrinated with the beliefs of military leaders. Although some limitations on the rights of soldiers may be required by military necessity, see *Parker* v. *Levy*, 417 U.S. 733, our military institutions are under civilian control, and our soldiers are full citizens with a right to consider the social, economic and political issues of the day and a right to vote. See *Carrington* v. *Rash*, 380 U.S. 89.

Military authorities, like civilian authorities, have fully ample means to remedy any illegal, speech-related activities without imposing a prior restraint based on content.[35] Moreover, if a prior restraint based on content can be imposed on distribution of handbills on public streets, sidewalks and parks, surely military discipline and morale is not the only interest government authorities will raise to justify this form of censorship. Civilian authorities have also asserted important interests, such as preserving peace and order, but the Court has always ruled that they may not further those interests by a prior restraint on the content of handbills distributed on public streets, sidewalks and parks. Like their civilian counterparts, military

35. See p. 28, *supra*.

authorities have no legitimate interest in censorship of the thoughts and views to which the American citizens under their jurisdiction are exposed.

Free speech would be an empty phrase if it did not include the freedom to express views without prior censorship. This Court has never separated these two rights with regard to constitutionally protected speech in public places.[36] Indeed, the right to speak and distribute literature on public streets, sidewalks and parks was first enunciated by this Court in cases that involved the corrolary right to be free from prior censorship there, *Lovell* v. *Griffin*, *Hague* v. *CIO*, and *Schneider* v. *State*, all *supra*. From that time to the present, including the *Flower* decision, the Court has refused to allow prior restraints based on content on our public streets, sidewalks and parks.

B.

The system of prior restraint at Fort Dix lacks precise and narrow standards and procedural safeguards.

Since no prior restraint on constitutionally protected speech and distribution of literature on public streets,

36. Petitioners concede the connection of these two rights:

"Official actions identified as unconstitutional prior restraints have occurred where public officials had forbidden the plaintiffs the use of *public places* to say what they wanted to say. *Southeastern Promotions, Ltd.* v. *Conrad* . . . (emphasis added). But when, as here, the place is not a public forum to begin with, the power to deny its use in advance of actual expression is not constitutionally suspect." Pet. Brief 46.

Petitioners transform the Court's use of the phrase "public place" into the phrase "public forum" and argue that the open areas of Fort Dix are not "public forums." As we argue in Point IB, *supra*, public streets, sidewalks and parks in civilian communities, like those at Fort Dix, are not primarily dedicated to use as public forums. However, if they are open to the public and use for exercise of First Amendment rights does not unduly conflict with their primary purpose, they are an appropriate situs for exercise of First Amendment rights.

sidewalks and parks has been approved by the Court, there are no decisions concerning the standards and procedural safeguards that would be required. However, the Court's decisions concerning systems of prior restraint in the context of regulation of obscenity[37] provide some basis for evaluating the system of prior restraint at Fort Dix.[38]

First, there must be precise and narrow standards that do not infringe on constitutionally protected speech. E.g., *Roth* v. *United States*, 354 U.S. 476; *Jacobellis* v. *Ohio*, 378 U.S. 184.

Fort Dix Regulation 210-27 provides no standards. Petitioners state that approval would be denied only "in regard to publications that clearly threaten military discipline or morale" and that a commander cannot prevent distribution because he does not like the contents or because a publication "is critical—even unfairly critical—of government policies or officials," citing Army regulations and directives (Pet. Brief 43-44). However, the Army's Directive on Guidance and Dissent, cited by petitioners, and Department of Defense Directive 1325.6 provide that the fact that a publication "is critical of government policies or officials" is not "in itself" a ground for disapproval (II-App. E-8, E-51), which would appear to mandate consideration of whether the content is critical of government policies or officials. The record reveals, moreover, that at Fort Dix the standards actually applied to various forms of speech include whether the message "further[s] our mission" and whether it is "wrong" (I-App. 64, 76-77).

The standard "clearly threaten[s] military discipline or morale" fails to specify any required immediacy or magnitude of an anticipated threat to discipline or morale.

37. The standards evolved in the context of the obscenity cases have been applied to seizures of imported materials and restrictions on the use of the mails. *United States* v. *Thirty-seven Photographs*, 402 U.S. 363; *Blount* v. *Rizzi*, 400 U.S. 410.

38. Presumably, the standards applied in this context, involving constitutionally protected activity on public streets, sidewalks and parks, would be more stringent.

By further providing that a publication should not be denied approval solely because it is "critical of government policies or officials," petitioners have mandated that the standard "clearly threatens military discipline or morale" includes consideration of whether the publication is critical of government policies and officials. Such criticism is, of course, constitutionally protected, and this gloss indicates that the standard concerns not only avoidance of disruption and illegal conduct but raw censorship. Many of the publications allowed on the base, including certainly anything containing the views of major as well as minor party candidates seeking to replace an incumbent president, would be suspect pursuant to this standard. And if criticism of government policies and officials is to be considered, how is the censor to distinguish allowable from prohibited criticism? No basis or standards for this distinction are provided.

Furthermore, the record demonstrates that the actual standards applied at Fort Dix include whether the content "further[s] our mission," which is interpreted to exclude a viewpoint opposed to the war in IndoChina, and whether the content is "wrong" (I-App. 64, 76-77). Although the conduct of a war is surely a military mission, the decision of whether or not the United States enters or continues a war is just as surely a civilian, not military, concern, and military personnel, as well as civilians, have a right to consider and participate in that decision. These standards are vague and overly broad, giving the censor discretion to prohibit clearly protected speech.

Secondly, the system of prior restraint at Fort Dix lacks the minimal procedural safeguards necessary for a valid system of prior restraint of obscenity. The Army regulations and directives and Fort Dix Regulation 210-27 fail to: (1) place the burden of instituting judicial proceedings and the burden of proof on the censor; (2) provide a specific, brief time limitation for preserving the status quo pending judicial action; or (3) provide for a judicial determination.[39] E.g., *Southeastern Promotions* v. *Conrad*, 95 S.Ct. at 1247; *Freedman* v. *Maryland*, 380 U.S. 51; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70-71.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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39. A military official or board "may well be," like the administrative censorship board in *Southeastern Promotions* v. *Conrad*, 95 S.Ct. at 1247-48, "less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression."

*Counsel was assisted in the preparation of this brief by Linda Backiel, a law student at the Rutgers Law School at Camden, and Martha Bush, a law student at the University of Pennsylvania Law School.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-848

THOMAS U. GREER, Commander,
Fort Dix Military Reservation, *et al.*,
Petitioners,

—v.—

BENJAMIN SPOCK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *AMICI CURIAE*

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In The

Supreme Court of the United States

October Term, 1975

No. 74-848

THOMAS U. GREER, Commander,
Fort Dix Military Reservation,
et al.,

Petitioners,

v.

BENJAMIN SPOCK, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief of the American Civil Liberties Union and American Civil Liberties Union of New Jersey, *Amici Curiae*

Interest of Amici [1/]

1/ Letters from the parties, consenting to the filing of this brief, have been filed with the Clerk of the Court.

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 250,000 members dedicated solely to protection of the Bill of Rights. The American Civil Liberties Union of New Jersey is the New Jersey affiliate of the ACLU, defending civil liberties in the State of New Jersey where this action arose. In its fifty-five year existence, the ACLU has defended the First Amendment rights of speech, press, assembly and petition, on behalf of civilians and members of our armed forces alike. Indeed, in many of the previous cases bearing upon the issues here, the ACLU has provided counsel to represent persons whose First Amendment rights had been infringed by military rules and regulations. As in those cases, the issues here involve competing claims of freedom of expression and military necessity. This brief is intended to assist the Court in resolving those varying claims.

Introductory Statement

This case involves the important issue of civilian access to portions of a military post generally open to the public, for purposes of communicating information to the occupants. First Amendment rights of free expression, of access to an audience, and to receive information are all at stake.

Fort Dix Military Reservation composes 55 square miles in a rural setting 18 miles from Trenton, New Jersey. It is occupied by approximately 15,000 servicemen, 6,080

civilians in family units, and (during working hours) 2,600 civilian employees. It is traversed by 10 roads, all of which have unrestricted vehicular and pedestrian traffic, with a 1970 count of 66,000 daily vehicles. Spock v. David, 469 F.2d 1047, 1053-54 (3d Cir. 1972). There are no check points or barriers to entrance.

Respondents here are citizens who wished to distribute leaflets on portions of the post, and a candidate for national political office who wished to conduct a rally and make a political speech on some appropriate site within the post. (See Pet. App. 2a.) They were impeded by two Fort Dix regulations -- 210-27, ¶3 and 210-26, ¶2(a). The former imposes a prior restraint by requiring authorization for distribution of any literature anywhere on the Fort Dix reservation, and the latter absolutely bans the conduct of a political demonstration on army property. The constitutionality of these two regulations -- both on their face and as applied -- is in issue.

The Third Circuit Court of Appeals concluded that both regulations violated the First Amendment. Spock v. David, supra. Upon remand, the district court entered an injunction against petitioners, an order barring interference with political campaigning and the distribution of literature "within areas where the public has open access to Fort Dix." (Pet.App. 42a-45a). This order was expressly made subject to necessary restrictions on the time, place,

or manner of the expressive activities allowed. (Ibid.) The Third Circuit affirmed. 502 F.2d 953 (3rd Cir. 1974).

Some emphasis on the factual background is appropriate. Respondents were intent on exercising First Amendment rights in their most pristine and classic form -- oral address and distribution of handbills. There was no intention to interfere with military operations or personnel. No actual interference took place. There was no effort to impose a message on a disinterested or captive audience; all prospective hearers were free to ignore the respondents' communications. Fort Dix was an open post, and respondents sought and received access only to portions of the post generally available and open to the public.

Summary of Argument

I.

Fort Dix regulation 210-27 ¶3(a), which requires prior command approval for the "distribution or posting of any publication," cannot constitutionally be applied to those portions of the base which are generally open and accessible to the public. Even where government property is primarily dedicated to uses and functions unrelated to expression or communication, so long as the location is generally open to the public, First Amendment activity which does not interfere excessively with the primary use of the area cannot be prohibited. Edwards

v. South Carolina, 372 U.S. 229 (1963); Brown v. Louisiana, 383 U.S. 131 (1966); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). These principles apply with the same force to the public areas of military installations and property. Flower v. United States, 407 U.S. 197 (1972); United States v. Gourley, 502 F.2d 785 (10th Cir. 1974); Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973).

II.

The Fort Dix regulation requiring command approval for distribution of any publication embodies a facially defective system of prior restraints which cannot overcome the heavy presumption against its constitutional validity, New York Times v. United States, 403 U.S. 713 (1971); Southeastern Promotions, Ltd. v. Conrad, ____ U.S. ____, 95 Sup. Ct. 1239, 43 L.Ed. 2d 448 (1975), even in the context of communications to and by military personnel. See, Parker v. Levy, 417 U.S. 733 (1974). The operative terms of this prior restraint system -- "a clear danger to the loyalty, discipline, or morale of troops" -- lack the precision and clarity sufficient to guide the censor and are far too sweeping in their prohibition. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); United States v. Priest, 21 USCMA 564, 45 CMR 338 (1972). Similarly, the regulatory arrangement is entirely lacking in the procedural safeguards that any prior restraint scheme must provide. Southeastern Promotions, Ltd.

v. Conrad, supra.

III.

Fort Dix regulation 210-26 ¶2(a), forbidding all "demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" from taking place on the installation, violates the First Amendment which requires that suitable public areas be available for orderly communication and expression. Police Department, City of Chicago v. Mosley, 408 U.S. 92 (1972); Tinker v. Des Moines Independent Community School District, supra. The army's political neutrality would not be threatened by an even-handed policy permitting access to appropriate public areas of Fort Dix. Indeed, such an even-handed policy is constitutionally required. Allowing such First Amendment activities to take place on the portions of the base open and accessible to the public will not intrude upon the concerns for protecting the captive audience which were identified in Lehman v. City of Shaker Heights, 418 U. S. 298 (1974).

Argument

I.

FORT DIX REGULATION 210-27 ¶3(a) CANNOT CONSTITUTIONALLY BE APPLIED TO THE PORTIONS OF FORT DIX WHICH ARE GENERALLY OPEN AND ACCESSIBLE TO THE PUBLIC.

Fort Dix Regulation 210-27 ¶3(a) reads, in relevant part:

> The distribution or posting of any publication...is prohibited on the Fort Dix Military Reservation without prior written approval....

Whatever the Court's determination may be concerning the facial validity of this provision, see Point II, infra, the prior restraint embodied in this regulation cannot be applied on "open" areas of Fort Dix. Such areas constitute an appropriate public forum on which non-intrusive first amendment activity such as leafletting cannot be impeded by a prior restraint. Flower v. United States, 407 U.S. 197 (1972).

Even though governmental property may be primarily dedicated to functions unrelated to expression, its use for non-intrusive expression is constitutionally required so long as the locale is generally available to the public and so long as the expressive activity will not interfere excessively with the primary governmental use. See Brown v. Louisiana, 383 U.S. 131 (1966) (library); Edwards v. South Carolina, 372 U.S. 229 (1963) (state house); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (school); Grayned v. City of Rockford, 408 U.S. 104, 120 (1972). This Court has already determined that a blanket prior restraint cannot

be applied to an entire area just because it is denominated a military reservation. See Flower v. United States, 407 U.S. 197 (1972). In Flower, a prior restraint regulation and a "bar order" were held invalid as applied to a civilian distributing literature on a street in Fort Sam Houston which was generally accessible to the public. Id. at 198. Some portions of an "open" military post must be available to leafletting and the like without the burden of prior restraint.

Petitioners seek to distinguish Flower on two grounds: first, that the military streets at Fort Sam Houston were somehow more open to the non-military public than the streets at Fort Dix, and second, that Flower does not establish the rule that publically accessible areas of military reservations are appropriate places for First Amendment activity. The first contention is undermined by the record; the second by recent decisions.

Petitioners seek to distinguish Flower on the basis that the roads in Fort Dix are patrolled, or to restrict Flower narrowly to streets or roads. There can be no question that, patrols or not, Fort Dix is an "open" post within the meaning of Flower. Fort Dix is traversed by 10 paved roads including a major state highway. While these roads may be "patrolled," they are open to unrestricted vehicular and pedestrian traffic; there are no barriers or screenings to impede entrants. See Spock

v. David, 469 F.2d 1047, 1053-54 (3d Cir. 1972). A 1970 daily vehicle count registered 66,000 vehicles. Id. at 1054. There are few restricted areas on the post. Civilians are welcome as visitors to personnel and as tourists. Ibid. On one recent occasion, the post hosted 100,000 visitors during a two-day celebration of the Army's bicentennial. Newark Star Ledger, June 16, 1975, p. 8, col. 6. Public access to Fort Dix is thus essentially unrestricted.

Nor can Flower's proscription on prior restraints be limited to "streets" within the post. While streets, as public thoroughfares, may be the most appropriate locus for expressive activity, many other public facilities are suitable for expression closely akin to pure speech (e.g., handbilling); such locales must be permitted to be used for expression. Brown v. Louisiana, supra; Edwards v. South Carolina, supra; Tinker v. Des Moines Independent Community School District, supra. General public accessibility to the particular locale, and non-disruption of governmental functions, are the keys. Within an open post like Fort Dix there are numerous areas where non-intrusive expression is appropriate. These include the post exchanges, family housing areas, movie theaters, and commissaries. (See Pet. App. 36a). Flower clearly dictates access by pamphleteers to public thoroughfares on an open military reservation. And the Court's rationale there applies equally to the post areas listed above which are unre-

stricted and eminently suitable for non-intrusive expressive activity. There is simply no reason in principle to restrict access to ideas and communications to "the streets." Cf. Grayned v. City of Rockford, supra, 408 U.S. at 120.

Subsequent cases have confirmed that Flower cannot be confined to streets and roads. See United States v. Gourley, 502 F.2d 785 (10th Cir. 1974); Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973); CCCO Western Region v. Fellows, 359 F.Supp. 644 (N.D. Calif. 1972); Jenness v. Forbes, 351 F.Supp. 88 (D.R.I. 1972). In Gourley, the 10th Circuit ruled that portions of the Air Force Academy generally open to the public,[2/] such as the stadium and chapel areas, must be available to civilians for expressive purposes. Relying upon Flower, the court commented:

> [W]hen the commander permits portions of the installation to be open to the general public, and visitors are encouraged, he may not restrict an individual's

2/ The Academy was found to be an open post even though its entrances were manned around the clock by sentries. 502 F.2d at 787. This closing was deemed "ritualistic" since no substantial stopping or checking was actually made of visitors during daylight hours. Id. at 787-88.

> exercise of his First Amendment rights in such public areas. 502 F.2d at 787.

In Burnett, the Fourth Circuit, citing Flower, stated that where a military reservation is open to the public, "civilians have an unqualified right to enter such public areas and to exercise their constitutionally protected freedom of expression...." 474 F.2d at 880. The court added: "Where the area of the base involved is one open to the public, the base commander has no discretion, but instead a ministerial duty to allow peaceful leafletting regardless of the views sought to be expressed." Id. at 882. That case dealt with Fort Bragg, North Carolina. CCCO spoke to the Presidio in San Francisco, with the court reaching a similar conclusion. In Jenness, the district court held that a prior restraint regulation could not be applied in housing areas of the Quonset Naval Air Station, Rhode Island. 351 F. Supp. at 95-96. In all of these cases, the courts stressed the accessibility of open post areas to the public, and the absence of any disruption to military functions stemming from peaceful, non-intrusive expression in such areas. Cf. Chicago Area Military Project v. City of Chicago, 508 F. 2d 921 (7th Cir. 1975) (opening up public areas of an airport for expressive activity) and Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 (2d Cir. 1974) cert. denied, 419 U.S. 838 (1974) (permitting leafletting on public waiting areas within a state welfare center).

Reasonable limitations upon time, place, and manner may of course be imposed in order to prevent interference with on-going governmental activities. See Grayned v. City of Rockford, supra, 408 U.S. at 116; Albany Welfare Rights Organization, supra, 493 F.2d at 1324-25. The district court's injunction in this case specifically provided for such limitations. (Pet. App. 45a). But a broad prior restraint, screening the content of expression on all portions of a federal military reservation, cannot be constitutionally tolerated.

II.

FORT DIX REGULATION 210-27 ¶3(a) IS, ON ITS FACE, CONSTITUTIONALLY DEFECTIVE IN FAILING TO PROVIDE A NARROW AND PRECISE STANDARD FOR SCREENING PUBLICATIONS AND IN FAILING TO PROVIDE PROPER PROCEDURAL SAFEGUARDS FOR A PRIOR RESTRAINT.

Fort Dix Regulation 210-27 ¶3 indicates that the Post Commander will screen in advance, and can suppress, any publication. It reads, in relevant part: "The distribution or posting of any publication, . . .is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General."

On its face, this provision offers no standard for the prior screening of written materials. There are, however, supplementary sources which purport to limit a commander's discretion in implementing this prior restraint. Army Regulation 210-10,

¶5-5 contains the following language:

> If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may...delay the distribution of any publication which he considers undesirable, on property subject to his control.

Department of Defense Directive 1325.6 (1969) reiterates the "clear danger to the loyalty, discipline, or morale of military personnel" standard. See Note, 73 Colum. L. Rev. 1089, 1091-99 (1973). According to that directive, the fact that a publication is "critical -- even unfairly critical -- of government policies or officials is not, in itself, a ground for denial." (Emphasis added). See Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970) cert. denied, 401 U.S. 982 (1971); Schneider v. Laird, 453 F.2d 345 (10th Cir. 1972) cert. denied, 407 U.S. 914 (1974). In short, the government does not contend that a military post is inappropriate for expressive activity. It insists on screening in advance the content of every publication to be circulated on any part of this open post, Fort Dix.

Venerable doctrine establishes that any system of prior restraint bears a heavy presumption against its constitutionality. See, e.g., Southeastern Promotions Ltd. v.

Conrad, __ U.S. __, 95 Sup.Ct. 1239, 43 L.Ed. 2d 448 (1975); New York Times v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415(1971); Saia v. New York, 334 U.S. 558 (1948); Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. State, 308 U.S. 147 (1939). A principal objective of the First Amendment was elimination of prior restraints under which government officials could control, in advance, the dissemination of views. The fear is that the government censor will impede and delay expression of views found to be annoying. Saia v. New York, supra, 334 U.S. at 560-63; Cox v. Louisiana, 379 U.S. 559, 593 (1965). "Because of their potential use as instruments for selectively suppressing some points of view, this Court has condemned licensing schemes which lodge broad discretion in a public official to permit speech related activity." Police Department, City of Chicago v. Mosley, 408 U.S. 92, 97 (1972). "(A) free society prefers to punish the few who abuse rights of speech after they breach the law." Southeastern Promotions, Ltd. v. Conrad, supra, ____U.S. at ____, 95 S.Ct. at 1246; see United States v. Crowthers, 456 F.2d 1074, 1080 (4th Cir. 1972).

These principles are fully applicable to the instant case. While military personnel may suffer some impingements on normal First Amendments freedoms (see Parker v. Levy, 417 U.S. 733, 758 (1974)), they still retain a First Amendment right to

receive information and ideas. Moreover, in this case, civilians are seeking to exercise rights of expression, and substantial numbers of civilians are within the audience sought to be reached on the military post. Given the strong traditional aversion to prior restraints and the heavy presumption against their constitutional validity, only the most compelling demonstration of necessity -- one not made here -- can support any prior restraint. New York Times v. United States, supra. Preservation of military discipline and loyalty are valid objectives, but abuses of expression may be reached by the government after they occur. In the case of military personnel, Article 134 of the Uniform Code of Military Justice is available to punish speakers who materially interfere with discipline or loyalty. See, e.g., Parker v. Levy, supra; United States v. Priest, 21 USCMA 564, 45 CMR 338 (1972). Civilians, too, may be punished for speech which imminently jeopardizes valid governmental interests. Cf. Brandenburg v. Ohio, 395 U.S. 444 (1969). Thus, the normal First Amendment approach -- punishing abusive speech when, if, and after it takes place -- is fully applicable to an open military post.

This brief has argued that any prior restraint going to content of message is constitutionally impermissible on those many portions of Fort Dix which are accessible to the public and suitable for expresive activity. Point I, infra. To the extent that the primary use of the base for

military functions need be preserved, limitations on time, place, and manner of expression -- but not content -- may be imposed. But even if some form of prior restraint were found to be tolerable on an open military post, Fort Dix Regulation 210-27, ¶3 would still be constitutionally defective. For any prior restraint scheme must satisfy two conditions -- presenting precise and clear standards to guide the censor and guaranteeing procedural safeguards to ensure prompt review of the censor's determinations. Southeastern Promotions, Ltd. v. Conrad, ___ U.S. ___, 95 Sup. Ct. 1239, 1247 (1975). Fort Dix Regulation 210-27, ¶3 fails on both counts.

A. There Are No "Precise and Clear" Standards to Limit the Post Commander in Censoring Publications

"(A) law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority," is void. Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969). (Emphasis added). Under Fort Dix Regulation 210-27, ¶3, the post commander may suppress any publication which he finds poses "a clear danger to the loyalty, discipline, or morale of troops." It is submitted that this standard, both on its face and as construed in the interpretive material mentioned above, is constitutionally deficient.

In the first place, this prior re-

straint regulation is not "narrow." In the context of a prior restraint, where the censor is speculating about the consequences which may flow from speech, a rigid clear-and-present-danger standard ought to be imposed. This means that the harm envisioned must be substantial and that it must be imminent. See Whitney v. California, 274 U.S. 357, 379 (1927) (Brandeis, J., concurring); Carroll v. Princess Anne, 393 U.S. 175 (1968); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Kiiskila v. Nichols, 433 F.2d 745, 751 (7th Cir. 1970); United States v. Priest, 21 USCMA 564, 570, 45 CMR 338, 344 (1972); United States v. Daniels, 19 USCMA 529, 535, 42 CMR 131, 137 (1970). Yet the "clear danger" standard of Regulation 210-27, ¶3 does not speak either to the magnitude or immediacy of the harm feared from the speech. Numerous publications critical of government policy, government officials, or the Army might well affect morale to some degree. But the Post Commander, in administering Regulation 210-27, ¶3, is not instructed to consider the magnitude of damage to morale, or its immediacy, in assessing the desirability of allowing a publication on the post. Moreover, morale is an intangible concept relating to ideas and attitudes. Permitting the commander to screen expression in order to preserve "morale" is idea and thought control. Under the rubric of morale, commanders may easily seek to insulate the occupants of a military post

(civilians as well as military personnel) from ideas that do not conform to prescribed official doctrine.

Nor is the "clear danger" standard "objective and definite" within the meaning of the Shuttlesworth test. The amorphous nature of the term "morale," and the room for subjective assessment of harm to morale which this regulation leaves, have already been mentioned. "Loyalty" is also a vague concept which has never been defined in the context of the regulation under consideration here. Cf. Baggett v. Bullitt, 377 U.S. 360 (1964). The vagueness of these terms, in combination with the failure of the regulation to require substantial and immediate harm, are sufficient to void the prior restraint. Unlike the case with Article 134 of the Code of Military Justice, the vague language here is not salvaged by established "customs and usages" giving specific content to the terminology.

Parker v. Levy, 417 U.S. 733 (1974), did indicate that because the military is "a specialized society" with "a separate discipline," the government may have some greater constitutional flexibility in prescribing rules which govern the activity of

military personnel rather than civilians. 417 U.S. at 743, 744, 756-759, supra. Levy expressed willingness to tolerate "areas of uncertainty" in a military code. But this case is significantly different from Levy. There, this Court dealt with provisions of the military code applicable to a full range of military conduct, while here the regulation in issue touches solely on expression. The Levy opinion conceded that a "greater degree of specificity" is appropriate in such a case. 417 U.S. at 752. Thus, in the context of a prior restraint upon pure speech, the government can be expected and required to narrowly and carefully define any speech sought to be suppressed. Moreover, the present regulation circumscribes the expressive activities of civilians, not just military personnel. Though there may be reasons why military personnel, as employees of the government subject to special duties and loyalties, may enjoy modified speech prerogatives. Parker v. Levy, 417 U.S. at 759, supra; cf. Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973); Alderman v. Philadelphia Housing Authority, 496 F.2d 164, 173-174, (3d Cir. 1974), cert. denied, 419 U.S. 844 (1974), such considerations do not apply where civilians are regulated, as is the case with Fort Dix Regulation 210-27, ¶3. Service regimentation cannot be imposed on the thousands of civilians who visit a military reservation; these persons cannot be asked to surrender their First Amendment

rights as they enter federal soil. Cf., Kinsella v. United States, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957). And civilians form a large part of the audience to be reached a Fort Dix. "(H)istory teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

The government's claim that considerations of military discipline and morale necessitate a broad prior restraint upon expression has no validity in the context of an open post in the United States where radio, television and all other forms of communication are readily accessible. No significant effort is made to censor material which arrives at Fort Dix through official outlets. Various media are permitted to reach soldiers without any effort to screen content to protect morale or loyalty. Moreover, a civilian entering Fort Dix can presumably convey any message he wishes by oral solicitation without having the content of that message screened in advance. It is only when that civilian seeks to circulate written material that the censorship machinery of Fort Dix Regulation 210-27, ¶3 is triggered. Given these leaks in the Army's efforts to screen communications from its personnel, the government's claim of military necessity for its present prior restraint machinery is unconvincing.

B. Appropriate Procedural Safeguards Are Entirely Lacking Under Fort Dix Regulation 210-27, ¶3.

To be valid, a prior restraint scheme must be accompanied by "procedural safeguards that reduce the danger of suppressing constitutionally protected speech." Southeastern Promotions, Ltd. v. Conrad, ____U.S.____, 95 Sup. Ct. 1239, 1247 (1975); see Freedman v. Maryland, 380 U.S. 51 (1965). Specifically, the government censor must undertake the burden of procuring a prompt judicial affirmation of any decision to suppress expressive material. This adversary proceeding is necessary for "assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." Carroll v. Princess Anne, 393 U.S. 175, 183 (1968). See Collin v. Chicago Park District, 460 F. 2d 746 (7th Cir. 1972); Le Flore v. Robinson, 434 F.2d 933 (5th Cir. 1970), vacated on other grounds, 446 F.2d 715 (5th Cir. 1971). A court is presumed to be more sensitive and responsive to free speech claims than administrative officials. See Southeastern Promotions, Ltd. v. Conrad, supra, ____U.S. at _____, 95 Sup. Ct. at 1247-48.

Under Fort Dix Regulation 210-27, ¶3, no procedural safeguards are provided. The post commander first makes an ex parte determination to suppress a publication. Any publication is then delayed for an indeterminate period while Army Headquarters is

informed of the suppression. A.R. 210-10, ¶5-5(c). No mechanism is provided for any adversary proceeding either within or without military channels. No burden of proof, or even burden of going forward, is placed on the post commander.

There is a grave danger that a post commander, attuned to considerations of Army discipline and order but unschooled in the dictates of the First Amendment, will have a tendency to find dangers to morale or loyalty in proposed publications. See Note, 73 Colum. L. Rev. 1089, 1104 (1973); cf. Southeastern Promotions, Ltd. v. Conrad, supra, at 1247-48. Certainly, some type of proceeding ought to be required at which the Commander can at least be exposed to arguments in favor of permitting publication. Moreover, a judicial source -- conversant with constitutional strictures -- ought to be available to pass on the validity of a suppression decision. (Presumably, a military tribunal would suffice despite some hazards of command influence). In the absence of such procedural safeguards, Fort Dix Regulation 210-27, ¶3 cannot be permitted to stand.

III.

FORT DIX REGULATION 210-26 ¶2(a), FORBIDDING ALL POLITICAL SPEECHES OR RALLIES ON THE RESERVATION, VIOLATES FIRST AMENDMENT GUARANTEES OF FREE SPEECH.

Fort Dix Regulation 210-26 ¶2(a) reads:

> Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation.

This provision was applied by Commander David to exclude Respondent Spock, then a candidate for the Presidency, from conducting a campaign rally on the Fort Dix Reservation. See also, A.R. 360-61 ¶ 2-2 forbidding Army participation or cooperation in any civilian activity which might benefit or appear to benefit a political group and A.R. 600-20, 5-16 prohibiting partisan political activity by any serviceman.

The government contends that the above policy is necessary to preserve the reality and the appearance of political neutrality of the Army. The Third Circuit Court of Appeals branded the Army's policy "feigned neutrality" and asserted that it "stretches credulity to assume that permitting such [evenhanded] use would be an endorsement or selective benefit." Spock v. David, 469 F.2d 1047, 1055-56 (3d Cir. 1972). The Court emphasized that the practical effect of the regulation is to exclude only minor party candidates from access to the 28,000 Fort Dix occupants, for mass media enables major party candidates to reach the post's occupants. Id. at 1056.

The Third Circuit's determination is eminently sound. First Amendment interests dictate that suitable public areas of Fort

Dix be available for orderly communication and expression. (See, Point I, infra). And once a forum is made available for speech purposes, the Constitution also dictates that access to the forum be administered in an evenhanded, non-preferential fashion. See Police Department, City of Chicago v. Mosley, 408 U.S. 92, 96 (1972). Distinctions in terms of subject matter -- e.g., political v. non-political speech -- are ordinarily not permissible; government "may not select which issues are worth discussing or debating in public facilities." Id. at 96. Thus, if the Army permits use of post facilities for a political speech, it is merely honoring the evenhanded policy of access for expressive activity which the Constitution compels. If this constitutionally required approach is followed, the Army's identification with any particular cause will not be possible and, so long as its administration of facilities is evenhanded, its political neutrality cannot be questioned. See generally Jenness v. Forbes, 351 F.Supp. 88, 100-01 (D.R.I. 1972). The Army is no more identified with a party's cause at a political rally than it is identified with a cause espoused on leaflets permitted to be circulated on a post. The Army's articulated fear of losing neutrality thus represents the kind of undifferentiated fear which cannot be used to justify selective exclusion of a particular type of speech from a public forum. See Police Department, City of Chicago v. Mosley, supra, 408 U.S. at 101; Tinker v. Des Moines Independent Community School District,

393 U.S. at 508.

Petitioners refer to problems of administration and appearances of favoritism as justifying exclusion of political meetings from Fort Dix, citing Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) for support. In Lehman, this Court sustained the exclusion of political advertising from posters on a municipal transit system, and the opinion did refer to "lurking doubts about favoritism, and sticky administrative problems. . .in parcelling out limited space to eager politicians." Id. at 304.

Lehman is, however, distinguishable from the instant case in several respects. In the first place, Lehman dealt with limited resources -- poster space on a streetcar -- which numerous candidates could be expected to utilize. It is improbable that federal reservations will be deluged with requests for campaign or rally space. More importantly, Lehman dealt with a captive audience, in circumstances where political messages would be inflicted upon the transit passenger. "The streetcar audience is a captive audience." Id. at 302. That element -- presence of a captive audience -- was crucial to the decision, as the concurring opinion of Justice Douglas makes clear. Id. at 307. See also Chicago Area Military Project v. City of Chicago, 508 F. 2d 921, 926 (7th Cir. 1975). Finally, the transit system in Lehman did not present the kind of open spaces or public thoroughfares suitable for political ex-

pression. Lehman v. City of Shaker Heights, supra, 418 U.S. at 303. Fort Dix clearly does have, within its 55 square miles, areas suitable for such expression. Pursuant to court order, Respondent Spock did hold one rally on the reservation without difficulty. And the post recently accommodated 100,000 visitors on one weekend. See Newark Star Ledger, June 16, 1975, at p. 8, col. 6. "Just as Tinker made clear that school property may not be declared off-limits for expressive activity by students," Grayned v. City of Rockford, 408 U.S. 104, 118 (1972), the generally open areas of military installations may not be declared "off-limits" for expressive activity by soldiers and civilians.

Jenness v. Forbes, 351 F.Supp. 88 (D. R.I. 1972), illustrates both the suitability of a post for political activity and the feigned neutrality which the Army is seeking to preserve. There, the District Court initially upheld the constitutionality of a military ban on political rallies. But the military post was then made available as a campaign stop for Vice-Presidential candidate Agnew, and the court revised its opinion and ordered the post to be made available to candidate Jenness for a campaign meeting. The court commented:

> The Agnew visit poignantly emphasizes the validity of plaintiffs' argument that they, as minority party members, are denied access to channels of communication available to the two major parties,

> richer in resources of wealth, connections, and prestige.
> 351 F. Supp. at 100.

The Third Circuit Court of Appeals has also amply documented the difficulty and expense entailed in minor candidates reaching the 28,000 occupants of Fort Dix if direct access is denied. See Spock v. David, 502 F.2d 953, 956 (3d Cir. 1974). There is no demonstrable governmental interest which justifies isolating the approximately 28,000 Fort Dix occupants from the message of political candidates outside of the two major parties. To the extent that primary use of a military post and non-interference with military functions must always be preserved, the lower courts have provided for limitations on time, place and manner of political rallies which ensure the protection of these valid governmental interests.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

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